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TRANSCRIPT OF RECORD

Ct. of A. D. C.

Supreme Court of the United States

OCTOBER TERM, 1942

No. 870

GORDON KIYOSHI HIRABAYASHI

vs.

THE UNITED STATES OF AMERICA

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

FILED MARCH 30, 1943.

SUPREME COURT OF THE UNITED STATES

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UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

May Term, 1942

No. 45738

UNITED STATES OF AMERICA, Plaintiff,

v.

GORDON KIYOSHI HIRABAYASHI, Defendant

INDICTMENT—Filed May 28, 1942

Bio. Pub. Law #503, Curfew Act; Viol. Civilian Exclusion Order No. 57

UNITED STATES OF AMERICA,
Western District of Washington,
Northern Division, ss:

The grand jurors of the United States of America being duly selected, impaneled, sworn, and charged to inquire within and for the Northern Division of the Western District of Washington, upon their oaths present:

Count I

That Gordon Kiyoshi Hirabayashi, being a person of Japanese anscestry, whose true and full name is to the Grand Jury unknown, on or about the 11th day of May, 1942, and continuing until the date of the return of this indictment, at the City of Seattle, Northern Division of the Western District of Washington, and within the jurisdiction of this Court then and there residing and being within the [fol. 3] geographical limits of Military Area No. 1, as such area is defined and described in Public Proclamations Nos. 1 and 2, issued by J. L. DeWitt as Lieutenant General of the United States Army and as the Military Commander of the Western Defense Command, Fourth Army, and so designated by the Secretary of War, pursuant to the Executive Order below described, did then and there commit an act in said military area contrary to the military orders applicable to said military area, to-wit: contrary to the restrictions of Civilian Exclusion Order No. 57, dated

May 10, 1942, issued by the said Military Commander pursuant to Executive Order No. 9066, issued by the President of the United States on February 19, 1942, in that during all of the times above mentioned the said Gordon Kiyoshi Hirabayashi, being an individual living alone within the area prescribed by said Civilian Exclusion Order No. 57, he, the said Gordon Kiyoshi Hirabayashi, did then and there fail and neglect to report to the Civil Control Station located at Christian Youth Center, 2203 East Madison Street, Seattle, Washington, on Monday, May 11, 1942, between the hours of 8:00 o'clock A. M. and 5:00 o'clock P. M., or at all, and did fail to report to said Civil Control Station on May 12, 1942, between the hours of 8:00 o'clock A. M. and 5:00 o'clock P. M., or at all, contrary to directions of said Civilian Exclusion Order No. 57, when the said Gordon Kiyoshi Hirabayashi knew and should have known [fol. 4] of the existence and extent of the said orders and order and that the said acts above set forth were in violation of said orders; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

Count II

That on or about May 4, 1942, Gordon Kiyoshi Hirabayashi, being a person of Japanese ancestry, and then and there residing and being within the geographical limits of Military Area No. 1, as such area is defined and described in Public Proclamation No. 1, duly issued by J. L. DeWitt, Lieutenant General of the United States Army and designated as Military Commander of the Western Defense Command, Fourth Army, by the Secretary of War, pursuant to the Executive Order below described, did then and there commit an act within said military area and contrary to the restrictions applicable within said Military Area No. 1, which act was contrary to the restrictions of Public Proclamation No. 3, issued March 24, 1942, by the aforesaid Military Commander, pursuant to Executive Order No. 9066, issued by the President of the United States on February 19, 1942, in that the said Gordon Kiyoshi Hirabayashi failed to obey paragraph No. 1 of said Public Proclamation No. 3, which provides as follows:

"1. From and after 6:00 o'clock A. M., March 27, 1942, [fol. 5] * * * all persons of Japanese ancestry resid-

ing or being within the geographical limits of Military Area Number 1 * * * shall be within their place of residence between the hours of 8:00 o'clock P. M. and 6:00 o'clock A. M,. which period is hereinafter referred to as the hours of curfew,"

in that the said Gordon Kiyoshi Hirabayashi was not within his place of residence at Seattle, Washington, between the hours of 8:00 o'clock P. M. and 6:00 o'clock A. M. on or about May 4, 1942, when he, the said Gordon Kiyoshi Hirabayashi, knew or should have known of the existence and extent of said restrictions and order and that his act was in violation thereof; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

S/n. J. Charles Dennis, United States Attorney;
Allan Pomeroy, Asst. United States Attorney.

Endorsed: United States of America vs. Gordon Kiyoshi Hirabayashi.

Indictment

Vio. Pub. Law #503, Curfew Act;
Vio. Civilian Exclusion Order No. 57 a true bill,
Wendell P. Hurlbet, Foreman. J. Charles Dennis.

Presented to the Court by the Foreman of the Grand Jury in open court, in the Presence of the Grand Jury, and Filed in the U. S. District Court, May 28, 1942.
Judson W. Shorett, Clerk. By Lee L. Bruff, Deputy.

[fol. 6] IN UNITED STATES DISTRICT COURT

[Title omitted]

ARRAIGNMENT AND PLEA—June 1, 1942

Now on this 1st day of June, 1942, this cause comes on before the Court for arraignment and plea. Gerald D. Hile, Asst. U. S. Attorney appears for the Government. Attorney John Geisness appears for the defendant. The defendant is in court in custody of the U. S. Marshall and states that true names is Gordon Kiyoshi Hirabayashi. The defendant waives reading of the indictment and enters

a plea of not guilty to each and both counts as charged in the indictment. The defendant given the privilege to interpose motion or demurrer to the indictment within the next ten days, said motion or demurrer must be served and filed within that time.

[fol. 7] IN UNITED STATES DISTRICT COURT

[Title omitted]

WITHDRAWAL AND CONSENT TO SUBSTITUTION OF ATTORNEY—Filed June 11, 1942

Comes now John Geisness, attorney for the defendant in the above entitled cause, withdraws as attorney for said defendant and consents to the substitution of Frank L. Walters as attorney in his place and stead.

Dated this 11th day of June, 1942.

s/n John Geisness, Attorney for Dft.

Received a copy of the within withdrawal this 11th day of June, 1942.

J. Charles Dennis, Att. for Pltf.

[File endorsement omitted.]

[fol. 8] IN UNITED STATES DISTRICT COURT

[Title omitted]

HEARING ON DEMURRER—June 22, 1942

Now on this 22nd day of June, 1942, this cause comes on before the court for hearing on demurrer and defendants motion for permission to plead by motion to the indictment. G. D. Hile, Asst. U. S. Attorney appears for the Government and Attorney Frank Walters appears for the defendant. This cause is called. Defendant is in court in custody of the U. S. Marshal. Counsel for defense asks permission of the court to serve and file a motion to make the indictment more definite in certain particulars and also leave to file an amended demurrer, that the Government advised the court it has no objection to the granting of such motions

and it has been argued by counsel that leave to the defendant to file within one week from today is reasonable and that argument thereon might be had three weeks from today. Leave is granted to the defendant to serve and file within one week from today motion as mentioned in the motion now on file and also leave to serve and file within one week from today an amended demurrer pursuant to the oral application of defense counsel.

[fols. 9-10] IN UNITED STATES DISTRICT COURT

[Title omitted]

AMENDED DEMURRER—Filed June 29, 1942

Comes now Gordon Kiyoshi Hirabayashi, defendant above named and demurs to the indictment herein upon the following grounds as to Count I:

1

That said Count I of the Indictment fails to state facts sufficient to constitute a crime.

2

That Public Law No. 503, 77th Congress, approved March 21, 1942 under and pursuant to which this action is brought is too indefinite and too uncertain to be a valid criminal statute, and said Public Law No. 503 os unconstitutional and void in that it fails to define any crime or any course of conduct the violation of which will constitute a crime, and said Public law fails to defeine with reasonable precision what act or acts it intends to prohibit.

3

That Civilian Exclusion Order No. 57, dated May 10, 1942, is unconstitutional and void for the reason that J. L. De Witt, Lieutenant General of the United States Army, the Military Commander who issued said Order was with-
[fol. 11] out any power of authority to add or create any class of persons subject to the provisions thereof and designated as "persons of Japanese ancestry".

4

That said Order of the Military Commander above referred to is further unconstitutional and void for the reason that, if carried into effect said order would deprive this defendant of his liberty and property without due process of law in violation of the Fifth Amendment to the Constitution of the United States of America.

5

That said Order of the Military Commander above referred to is unconstitutional and void for the reason that, if carried into effect, it would deprive this defendant, an American citizen, of the privileges and immunities to which the citizens of the several states are entitled, in violation of and contrary to the provisions of Article IV, Section 2, Clause 1 of the Constitution of the United States of America.

6

That said Order of the Military Commander herein above referred to was and is unauthorized and void for the reason that it was not authorized by the Executive Order No. 9066 referred to in County I of the indictment, nor by any other order of the President of the United States.

7

That said Order of the Military Commander hereinabove referred to is and was unauthorized and void for the reason that said Executive Order No. 9066 referred to in Count I is unconstitutional and void insofar as it attempts to include in the class of persons who may be excluded any other persons than the alien enemies defined in section 21, Title [fol. 12] 50 of the United States Code pursuant to which said Executive Order was issued.

8

That said Public Law No. 503 and said Executive Order and the Public Proclamations and Military Orders hereinabove and in Count I referred to, are unconstitutional and void for the reasons that they violate the rights of this defendant to be free from unreasonable seizures of his person under the Fourth Amendment to the Constitution of the United States of America.

9

That said Public Law No. 503 above referred to is unconstitutional and void for the reason that it fails to set up any standards for the regulations which the Military commanders were permitted to promulgate and is therefore an unconstitutional delegation of the powers of the legislature.

10

That said Public Law No. 503 and the proclamations and military orders issued pursuant thereto are unconstitutional and void for the reason that they are arbitrary and capricious and fail to show or set up any sufficient or reasonable basis for the classification of persons subject thereto.

The defendant further demurs as to Count II of the indictment herein upon the following grounds:

1

That said Count II fails to state facts sufficient to constitute a crime.

[fol. 13] 2

That Public Proclamation No. 3, issued March 24, 1942 by the Military Commander referred to in said Count II, and particularly that portion thereof quoted in said Count II is unconstitutional and void for the reason that, if carried into effect, said order will deprive this defendant of his liberty and property without due process of law in violation of the Fifth Amendment to the Constitution of the United States of America.

3

That said order of the Military Commander, or Proclamation No. 3 above referred to is unconstitutional and void for the reason that, if it is carried into effect it will deprive this defendant, an American citizen of the privileges and immunities to which citizens of the several states are entitled, contrary to Article IV, section 2, clause 1 of the Constitution of the United States of America.

4

That said Public Proclamation No. 3 above referred to is unconstitutional and void for the reason that it is not au-

thorized by said Executive Order No. 9066 referred to in County II, nor by any other order of the President of the United States of America.

5

That said Public Proclamation No. 3 referred to in Count II is and was unauthorized and void for the reason that if is no- authorized by any valid legislative act of law of the Congress of the United States of America.

Received a copy of this within Amended Demurrer this 29th day of June, 1942. J. Charles Dennis, Atty for Pltf., Frank L. Walters, Attorney for the Defendant.

[File endorsement omitted.]

[fol. 14] IN UNITED STATES DISTRICT COURT

[Title omitted]

PLEA IN ABATEMENT—Filed June 29, 1942

And now comes, Gordon Kiyoshi Hirabayashi, defendant above named, in his own person and by Frank L. Walters, his attorney of record, and for his Plea in abatement of the indictment herein alleges:

1

That he, the defendant, was born on the 23rd day of April, 1918, in the County of King, State of Washington of said United States of America, and the said State of Washington, and that he has always borne and does now bear, true, full and complete faith and allegiance to the United States of America and the government thereof. That he is 24 years of age.

2

That he, said defendant, has never been and is not now, a native, citizen, denizen or subject of the Empire of Japan, and has never borne and does not now bear any faith or allegiance to the said Empire of Japan, or to the emperor or the government thereof.

3

That the full, true and correct name of this defendant is Gordon Kiyoshi Hirabayashi.

[fol. 15]

4

That the purported indictment herein, pursuant to and under which this defendant was arrested and incarcerated, is insufficient to constitute a valid indictment against this defendant in that said indictment fails to allege any citizenship status of this defendant and is therefor unlawful and void.

Where fore, said Gordon Kiyoshi Hirabayashi, defendant, prays for judgment herein of the said indictment that the same be quashed and dismissed, and further that whether the United States of America ought or can prosecute defendant for the premises that he may be discharged thereof without delay.

s/n Frank L. Walters, Attorney for the Defendant.

Duly sworn to by Gordon Kiyoshi Hirabayashi. Jurat omitted in printing.

[fols. 16-17] Endorsed: Received a copy of the within Plea in Abatement this 29th day of June 1942. L. Charles Dennis, Attorney for Pltf.

[File endorsement omitted.]

[fol. 18] In United States District Court, May Term, 1942

No. 45738

United States of America, Plaintiff,

vs.

Gordon Kiyoshi Hirabayashi, Defendant

Memorandum Opinion—Filed Sept. 15, 1942

The indictment involved in this action in Count I charges the defendant, a person of Japanese ancestry residing at Seattle in Military Area No. 1, with violating Civilian Exclusion Order No. 57 by failing to report to the Civilian

Control Station, and in Count II charges said defendant with violating the curfew provision of Public Proclamation No. 3 issued by the Military Commander of the Western Defense Command.

The defendant, after filing an original demurrer, later, pursuant to court permission, interposed an amended demurrer to each such count of the indictment upon the grounds that the orders and proclamations involved are unconstitutional by virtue of being in violation of the Fifth Amendment and of Article 4, Section 2, Clause 1 of the Constitution of the United States, and also are not authorized by Executive Order of the President or by any valid legislative act or law of Congress.

The defendant at the time of filing such amended demurrer, without any permission, filed a plea in abatement alleging that the defendant is a natural born citizen of this country, aged twenty-four, bearing true faith and allegiance to the United States and none to Japan.

The defendant two weeks prior to the filing of said plea in abatement asked for and was granted permission to file a [fol. 19] motion to make the indictment more definite and certain. No such motion was ever filed nor has the defendant at any time even to this date requested permission to interpose such or any plea in abatement.

The government has moved to strike such plea and has also demurred to same. The matter was presented to the court after oral argument supplementing very extensive briefs which in the aggregate cited about one hundred thirty court decisions and several texts. It is obvious that no analysis of such a mass of citations can be here indulged in without most tediously extending this opinion.

In substance and effect the defendant's position is that regardless of how critical the war perils, of how necessary and vital the military area, and of how essential to American success in this conflict the curfew provisions and evacuation orders applicable to those of Japanese ancestry in such military area, may be that the armed forces of this country and our government are absolutely helpless to make or enforce any such curfew provisions or exclusion orders until a Constitutional amendment has been proposed, voted by both houses of Congress, and finally adopted by three-fourths of the states.

It must not for an instant be forgotten that since Pearl Harbor last December we have been engaged in a total war

with enemies unbelievably treacherous and wholly ruthless, who intend to totally destroy this nation, its Constitution, our way of life, and trample all liberty and freedom everywhere from this earth. It must be realized that civilization itself is at stake in this global conflict.

[fol. 20] After grave and careful consideration of the arguments and authorities presented and of the extremely important phases of this question I am satisfied that Executive Order 9066, Public Law 503, the curfew regulation and Exclusion Order 57 are constitutional and valid, that the indictment is sufficient and that the attack the defendant has made against it must fail.

The attempted plea in abatement should be stricken. It was tardily interposed without permission. To permit it to stand would be a mistake by virtue of the precedent. However, the striking of it will not at all decrease or affect any rights of defendant.

The indictment in merely charging the defendant with being of Japanese ancestry permits the implication that he was born in the United States and is therefore a citizen. At the trial, defendant will, of course, be permitted to introduce evidence to such effect if he so desires.

At the close of the oral argument counsel were advised that my views as expressed in *Ex parte, Ventura, et al,* 44 F. Supp. 520, were quite at variance with the defense arguments in this case and that unless I came to the conclusion that I was then mistaken that of necessity my decision would be adverse to defendant's contentions now before me. It suffices to say that I am still of the opinion that my views as contained in that decision are correct.

It was recently stated in State of *California v. Anglim,* 129 F. 2d (CCA 9th) 455:

[fol. 21] "• • • The same act at one time may be regarded as constitutional by facts judicially noted or other facts then shown, and at another time, on other known or proved facts, be held unconstitutional. It was so held in an opinion by Mr. Justice Holmes in Chastleton Corp. v. Sinclair, 264 U. S. 543, 548, 549, 44 S. CT. 405, 67 L. Ed. 841, in determining the constitutionality of the rent regulating law for the District of Columbia."

And so the decision of this case must be in the light of the unprecedented world conflict which so suddenly engulfed this nation, in the light of this being a declared Military

Area, in the light of the dangers that would confront us if defendant should prevail, in the light of the advantage to this nation and actually to those of Japanese ancestry from the orders and proclamations which defendant attacks.

This Pacific Coast has been shelled at Santa Barbara, Seaside, Vancouver Island, ships have been submarined without warning in sight of shore, sinking has occurred near the entrance to the straits that lead to Puget Sound, Dutch Harbor has been bombed, and a formidable force of Japanese soldiers occupies Kiska Island. Who can guarantee that they who have already invaded the western Aleutians have not since Pearl Harbor been perfecting plans to attack by carrier planes and suicide parachutists the vital Seattle bomber factories, our docks so essential to Alaska's life, the navy yard at Bremerton just across the bay?

The commander in Chief of our Army and our Navy, the President, in exercise of the war authorities granted him by the Constitution and by certain legislation, on February 19, 1942 issued Executive Order 9066. Said Executive Order provides that the Secretary of War and Military Commanders designated by him were authorized and directed, whenever, they deemed such action necessary

[fol. 22] "• • • to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion • • •"

On February 20, 1942 the Secretary of War designated Lieutenant General DeWitt to carry out the duties and responsibilities imposed by said Executive Order for that portion of the United States embraced in the Western Defense Command, which includes Alaska, Washington, Oregon, California and five other states.

On March 2, 1942 in said Public Proclamation No. 1 General DeWitt declared that the entire Pacific Coast was by its geographical location

"• • • particularly subject to attack, to attempted invasion by the armed forces of nations with which the United States is now at war, and, in connection therewith,

is subject to espionage and acts of sabotage, thereby requiring the adoption of military measures necessary to establish safeguards against such enemy operations?''

On March 21, 1942 Public Law No. 503 enacted by Congress became effective. It reads, in part:

"• • • whoever shall • • • leave, or commit any act in any military area or military zone prescribed, under the authority of an Executive Order of the President, by the Secretary of War, or by any military commander designated by the Secretary of War, contrary to the restrictions applicable to any such area or zone or contrary to the order of the Secretary of War or any such military commander, shall, if it appears that he knew or should have known of the existence and extent of the restrictions or order and that his act was in violation thereof, be guilty of a misdemeanor • • •''

In Public Proclamation No. 3, issued March 24, 1942 as aforesaid, it is stated that

[fol. 23] The present situation within these Military Areas (including Military Area No. 1) and Zones requites as a matter of military necessity the establishment of certain regulations pertaining to all enemy aliens and all persons of Japanese ancestry within said Military Areas and Zones thereof.''

Civilian Exclusion Order No. 57, issued May 10, 1942, provided that after Saturday noon, May 16, 1942 "all persons of Japanese ancestry, both alien and non-alien, be excluded from that portion of Military Area No. 1'' consisting of that portion of Seattle in which the indictment alleged defendant resided, and further required that persons of Japanese ancestry personally or by representative as therein specified should report to the therein specified Civil Control Station on May 11 or May 12, 1942. Such Civilian Exclusion Order No. 57 then gave instructions relative to the regulations for evacuation to the Assemly Center.

In the very recent opinion under date of July 29, 1942 of the United States District Judge F. Ryan Duffy in the Lincoln Seiichi Kanai habeas corpus proceeding before him, in which such petitioner, an American citizen of Japanese ancestry, challenged the constitutionality of said

Presidential Order No. 9066 and attacked the validity of the same Military Area No. 1 herein involved, the court said:

"• • • This court will not constitute itself as a board of strategy, and declare what is a necessary or proper military area.

"• • • The field of military operation is not confined to the scene of actual physical combat. Our cities and transportation systems, our coastline, our harbors, and even our agricultural areas are all vitally important in the all-out war effort in which our country must engage if our form of government is to survive. • • • The theater of war is no longer limited to any definite geographical area. Saboteurs have already landed on our coasts. This court can [fol. 24] take judicial notice of the extensive manufacturing facilities for airplanes and other munitions of war which are located on or near our west coast.

"Rights of the individual, under our federal Constitution and its amendments, are not absolute. When such rights come into conflict with other rights granted for the protection and safety and general welfare of the public, they must at times give way. • • • *In re Schroeder Hotel Co.* (CCA, 7th), 86 F. (2d) 491; *Hitchman Coal & Coke Co. v. Mitchell, et al,* 245 U. S. 229.

"That there is nothing about the executive order, or the designation of the military area, which is unconstitutional, is very certain, considering the necessities and the exigencies of war which has already struck upon our Pacific coast."

The curfew provision and Civilian Exclusion Order No. 57 here involved are very definite and understandable. There is no good reason why defendant should not easily have comprehended what they required of him. It clearly appears that they are not only reasonable but vitally necessary.

The value to this country of such war measures seems most apparent. On even casual analysis their advantage to all those American citizens of Japanese ancestry who are loyal to this country also quickly appears.

Of vital importance in considering this question is the fact that the parachutists and saboteurs, as well as the soldiers, of Japan make diabolically clever use of infiltration tactics. They are shrewd masters of tricky conceal-

ment among any who resemble them. With the aid of any artifice or treachery they seek such human camo-flouge and with uncanny skill discover and take advantage of any disloyalty among their kind.

[fol. 25] The preamble to our Federal Constitution says:

"We, the people of the United States, in order to * * * provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this constitution for the United States of America."

The President as Commander in Chief, and the Military Commander in this Area have determined that the curfew, reporting and evacuation provisions applicable to persons of Japanese ancestry in certain vital military areas, are essential. It may well be assumed that Congress enacted Public Law No. 503 to authorize such determination "in order to * * * provide for the common defense * * * and secure the blessings of liberty to ourselves and our posterity."

While emergency cannot create power it can call into play a power already existing but only exercised in times of emergency. *Wilson* v. *New, et al.*, 243 U. S. 332, 348; *Home building & Loan Association* v. *Blaisdell*, 290 U. S. 398, 425-6. War powers are to be construed broadly. See *Hamilton* v. *Kentucky Distilleries Co.* 251 U. S. 146. It has been well said that "the power to wage war is the power to wage war successfully."

The defendant may most properly be deemed by the President, military forces and Congress as residing in a portion of a vital military fortress and factory arsenal. (Ex parte Ventura-supra).

In view of the war emergency the President and the Commander of this defense command, as authorized by Congress in said Public Law 503, may determine whether persons of Japanese ancestry shall observe curfew in a military area and whether they shall be removed therefrom.

The contentions that the Fourth, Fifth and Sixth Amendments or Article 4, Section 2, Clause 1 of the Constitution defeat the indictment has not been overlooked. Defendant has submitted his technical interpretations of such provisions.

[fol. 26] As has already been pointed out, certainly in time of war a technical right of an individual should not

be permitted to endanger all of the constitutional rights of the whole citizenry.

Article 4, Section 2, Clause 1 reads as follows:

"The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

Obviously such provision is not applicable to this case in these times under the circumstances now existing. The powers challenged by this defendant are being exercised not by any state but by the Federal Government.

The Fourth Amendment provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probably cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

In my opinion the indictment against defendant is not affected by such amendment.

The defendant, recognizing that the Fourteenth Amendment applies only to action by the states, has resorted to the Fifth Amendment. "But the Fifth Amendment, unlike the Fourteenth, has no equal protection clause." *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381, 401.

Defendant in such connection contends that the curfew regulations and exclusion order applicable to him are discriminatory. Such contention must be considered in the [fol. 27] light of the war emergency. The validity of conscription which applies only to certain ages of one sex and excepts certain classes of persons from military service has been judicially determined as not invalid on the ground of being discriminatory; moreover, the Social Security Act has successfully hurdled the objection that it was in violation of the Fifth Amendment in that it was discriminatory because it did not apply to certain employers or certain occupations. *Steward Machine Co.* v. *Davis*, 301 U. S. 548.

With respect to the application of the Fifth and Sixth Amendments in time of war Charles E. Hughes, in 1917, discussing "War Powers Under the Constitution", 42 American Bar Association Reports, 237, 243, stated:

"Clearly, these amendments, normally and perfectly adapted to conditions of peace, do not have the same complete and universal application in time of war."

Certainly a reading of the Sixth Amendment does not disclose any sufficient basis therein during the present emergency to defeat the indictment.

The holding of *Ex parte Milligan*, 4 Wall, 2, 18, U. S. 27, is not applicable here. This prosecution is being maintained in this court of law—in that case the defendant was tried before a military commission although the courts were then open and functioning. There are many other differences, as a reading of such will disclose, some of which are mentioned in *Ex parte Ventura*, et al., supra.

Dimouts, blackouts, air raid sirens, barrage balloons, are some of the many unprecedented precautionary measures deemed by the military to be necessary in this area. No [fol. 28] one can reasonably question the wisdom of such measures. And this court will not question in this time of war the wisdom or necessity of the curfew or evacuation orders with respect to those of Japanese ancestry which are involved in this proceeding. The situation is too grave — the menace too great. Nor can defendant substitute his judgment for the judgment of the Commander in Chief and the general acting under the President's direction, pursuant to constitutional powers and the Congressional ratification and authority of Public Law 503.

The Constitution of the United States was intended by the fathers who framed it to be able to cope with war emergencies. This nation came into being as a result of a successful war. The Constitution was written shortly thereafter and at a time when its framers had every reason, by virtue of their experience and in the light of then world conditions, to expect this nation would be confronted by wars in future.

In *Home Building & Loan Association* v. *Blaisdell*, supra, in the court's opinion by Chief Justice Hughes, at page 426 it is said:

"While emergency does not create power, emergency may furnish the occasion for the exercise of power. * * * The constitutional question presented in the light of an emergency is whether the power possessed embraces the particular exercise of it in response to particular conditions. Thus, the war power of the Federal Government is not created by the emergency of war, but it is a power given to meet that emergency. It is a power to wage war successfully, and thus it permits the harnessing of the entire energies of the people in a supreme cooperative effort to

preserve the nation. But even the war power does not remove constitutional limitations safeguarding essential liberties. *When the provisions* of the Constitution, in grant or restriction, are specific, so particularized as not to admit of construction, no question is presented. Thus, emergency would not permit a State to have more than two Senators in the Congress, * * * But where constitutional grants and limitations of power are set forth in general clauses, which afford a broad outline, the process of construction is essential to fill in the details."

[fol. 29] Unquestionably, the constitutional grants and limitations of power applicable to the question here involved are set forth in general clauses. Therefore, our Constitution does permit Congress and our President as Commander in Chief in time of war, to make and enforce necessary regulations to protect critical military areas desperately essential for national defense. In these days of lightning war this country does not have to submit to destruction while it awaits the slow process of Constitutional Amendment.

There must, of course, be extraordinary reasons to justify curfew for or any removal, even from a military area, of American citizens residing therein. But with respect to those of Japanese ancestry in Military Area No. 1 certainly since Pearl Harbor most extraordinary reasons have been obtained.

Written orders in harmony with this decision striking defendant's plea in abatement and overruling defendant's amended demurrer to each count of the indictment is requested.

Dated September 15th, 1942.

s/n Lloyd L. Black, United States District Judge

[File endorsement omitted.]

[fol. 30] In United States District Court

[Title omitted]

Order Denying Plea In Abatement and Overruling Demurrer—Filed Sept. 24, 1942

In the above entitled cause, it is hereby Ordered

(1) The plea in abatement filed by defendant is hereby denied. (Defendant excepts, exception allowed.)

(2) The defendant's amended demurrer is hereby overruled. (defendant excepts, exception allowed).

Done in open Court this 24th day of September, A. D. 1942.

s/n Lloyd L. Black, United States District Judge.

Presented by: J. Charles Dennis, United States Attorney.
Approved as to form: Frank L. Walters, Attorney for Defendant.

[File endorsement omitted.]

[fol. 31] IN UNITED STATES DISTRICT COURT

[Title omitted]

SUPPLEMENT TO MEMORANDUM OPINION DATED SEPTEMBER 15, 1942—Filed Oct. 17, 1942

Immediately following the first paragraph on the first page of the memorandum opinion herein dated Stepember 15, 1942, the following paragraph shall be inserted, to-wit:

"Upon arraignment the defendant pleaded not guilty to each count and was given the privilege of interposing motion or demurrer to the indictment within ten days."

Dated October 17, 1942.

s/n Lloyd L. Black, United States District Judge.

[File endorsement omitted.]

[fol. 32-33] IN UNITED STATES DISTRICT COURT

[Title omitted]

VERDICT—Filed Oct. 20, 1942

We, the jury in the above-entitled cause, find the defendant, Gordon Kiyoshi Hirabayashi is guilty as charged in Count I of the Indictment filed herein; is guilty as charged in Count II of the Indictment filed herein.

s/n Robert M. Bardue, Foreman.

Dated: October 20, 1942.

[File endorsement omitted.]

[fol. 34] IN UNITED STATES DISTRICT COURT

PROPOSED INSTRUCTIONS OF DEFENDANT—Filed October 20, 1942

Instruction No. —

You are instructed that Executive Order No. 9066 and Civilian Exclusion Order No. 57 and Public Proclamation No. 3 of the Military Commander were issued for the purpose of protecting our national defense materials, national defense premises, and national defense utilities against acts of espionage or sabotage.

You are further instructed that before any person could or can be excluded from any military area prescribed by the Military Commander or interned or compelled to obey any curfew regulations prescribed by a military commander, such person must first have been charged with engaging in or committing acts of espionage or sabotage of our national defense materials, premises or utilities; that he must have been given a hearing on such charges before an impartial tribunal where he could defend himself against the charges, have legal counsel to assist him and could produce witnesses on his own behalf; that after such hearing he must have been found guilty of the charge or charges against him; and that without such a hearing on such charges and his conviction thereof he would be under no duty to report to the Civil Control Station described in County I of the indictment, nor to obey the curfew regulations described in Count II of the indictment.

Therefore, unless you find from the evidence at this trial that the defendant here was so charged with engaging in espionage or sabotage or our nation defense materials, premises or utilities and after a hearing on such charges was convicted thereof, you can not find the defendant guilty under either count of the indictment.

[fol. 35] Instruction No. —

You are instructed that under a statute enacted by the Congress of the United States, alien enemies are defined as the "natives, citizens, denizens or subjects of the hostile nation or government" which has been declared by the President to be at war with the United States.

You are further instructed that the law presumes that such an alien enemy as above defined will commit acts of

espionage or sabotage against the United States, and on the basis of such presumption such an alien enemy can be temporarily restricted in his liberty of movement, or can be temporarily excluded from a military area, or can be temporarily compelled to obey curfew or other regulations relative to his movements and conduct; but that before such restriction of liberty, exclusion from a military area or obedience to such regulations could be made permanent, such alien enemy would first have to be charged with the commission of some act or acts of espionage or sabotage against the United States and have been granted a hearing before an impartial tribunal where he could defend himself against such charges, and must have been found guilty of the act or acts charged.

But you are further instructed that as to citizens of the United States of America no such presumption as above described exists either in law or in fact, and that before any citizen of the United States of American can be temporarily or permanently excluded from a military area or compelled to obey curfew or other regulation or have his liberty of movement restricted, he must first have been [fol. 36] charged with some act or acts of espionage or sabotage against the United States, have been granted a hearing on such charges before an impartial tribunal, and have been found guilty of the acts charged.

You are further instructed that the above protection accorded a United States citizen is guaranteed to him by the Constitution of the United States of America, and no discrimination can be made against him in that protection because of his race or color.

You are further instructed that the evidence at this trial proves in this case that the defendant here is a native born citizen of the United States of America, of Japanese ancestry, and that as such he is entitled to the above described constitutional protection regardless of his race, color or ancestry.

Therefore, unless you further find from the evidence here that the defendant was charged with an act or acts of espionage or sabotage against the United States, was granted a hearing on such charges where he was permitted to defend himself, and was found guilty of the act or acts charged, then I instruct you that the defendant owed no duty to obey Civilian Exclusion Order No. 57, nor Proclamation No. 3 of the Military Commander, and you

must find the defendant not guilty under either count of the indictment.

Instruction No. —

You are instructed that the Congress of the United States of America alone has the power to declare martial law in or over any portion of the United States, and that this power can not be delegated to the President or the Secretary of War or to any military commander designated by him. [fol. 37] You are further instructed that the existence of a state of war between the United States and a foreign country does not suspend the rights guaranteed by the Constitution that no person can be deprived of his life, liberty or property without due process of law. Such due process of law includes the right of a person to have a public hearing after he has been informed of the nature and cause of the accusation against him and his right to defend against such accusation, have counsel to assist in his defense, and to compel witnesses to testify on his behalf.

You are further instructed that unless you find from the evidence here that the defendant was accused of some unlawful act against the United States, was granted a hearing on such accusation where he was allowed to defend himself, and was found guilty of what he was accused, then I instruct you that the defendant was under no duty to obey Civilian Exclusion Order No. 57, nor Proclamation No. 3 of the Military Commander, and you must find the defendant not guilty.

[fol. 38] In United States District Court

[Title omitted]

Motion for New Trial

Comes now the defendant, by Frank L. Walters, his counsel herein, and moves the Court for a New Trial in the above entitled cause upon the following grounds:

1. That the verdict in and as to each Count of the indictment is against the weight of the evidence;

2. That the Court erred in its instructions as — the issues of fact to be determined by the Jury and as to the law of the case as to each count of the indictment;

3. That the Court erred in denying defendant's motion for a directed verdict of acquittal and dismissal of the action made at the close of the case by the plaintiff;

4. That the Court erred in denying defendant's motion for a directed verdict of acquittal and dismissal of the action made at the close of the whole case or trial;

5. That the defendant was not granted a fair and impartial trial on all of the issues in the action.

s/n Frank L. Walters, Attorney for the Defendant.

[fol. 39] IN UNITED STATES DISTRICT COURT

[Title omitted]

SENTENCE PRONOUNCED—October 21, 1942

Now on this 21st day of October, 1942, J. Charles Dennis, United States Attorney appearing for the plaintiff, this cause comes on before the Court for imposition of sentence of the defendant Gordon Kiyoshi Hirabayashi, on the verdict of guilty as charge- in both counts of the indictment. The defendant is present and in the custody of the United States Marshal and accompanied by his counsel Frank L. Walters. The matter is called and at the request of counsel for the defendant, the same is continued until 2 p. m., today, at which time the parties are all present as before. The defendant files a motion for a new trial. The same is argued, denied and overruled and an exception thereto is allowed. Statements are made by counsel for each side. At this time, pursuant to the verdict of the jury and upon the verdict of the jury, the Court adjudges that the defendant is guilty of the Charge contained in Count I of the Indictment and upon the verdict of guilty by the jury, pursuant to such verdict, the Court adjudges the defendant guilty on the charges contained in Count II of the indictment. The defendant through his counsel moves for an arrest of judgment in this case and moves that the defendant be released from custody and moves for a dismissal of the action. The [fol. 40] *The* motions and each of them are denied and overruled, an exception thereto is allowed counsel for the defendant. Sentence is pronounced at this time. The defendant, through his counsel, except to the entry of the foregoing

sentence and judgment, and such exception is noted and allowed.

Later, this day, written Judgment and sentence is signed by the court in the presence of the defendant and his counsel, the terms of which are as orally pronounced by the court. The defendant is remanded into custody.

[fol. 41] IN UNITED STATES DISTRICT COURT

[Title omitted]

JUDGMENT AND SENTENCE—Filed Oct. 21, 1942

Comes now on this 21st day of October, 1942, the said defendant Gordon Kiyoshi Hirabayashi into open Court for sentence, and being informed by the Court of the charges herein against him and of his conviction of record herein, he is asked whether he has any legal cause to show why sentence should not be passed and judgment had against him, and he nothing says, save as he before hath said.

Wherefore, by reason of the law and the premises, and the verdict of the jury finding defendant guilty on Counts I and II of the indictment, it is

Considered, ordered and adjudged by the Court that the said defendant Gordon Kiyoshi Hirabayashi is guilty as charged in Count I of the indictment and that on Count I he be committed to the custody of the Attorney General of the United States for imprisonment in the Federal Prison Camp, Dupont, Washington, or in such other like institution as the Attorney General of the United States or his authorized representative may be law designate, for the period of three (3) months.

[fol. 42] It is further considered, ordered and adjudged by the Court that the said defendant Gordon Kiyoshi Hirabayashi on Count II of the indictment, be committed to the custody of the Attorney General of the United States for imprisonment in the Federal Prison Camp, at Dupont, Washington, for the period of three (3) months; Provided, however, that the execution of the sentence on said Count II shall run concurrently with and not consecutively to the execution of the sentence imposed on Count I of the indictment.

And the said defendant is hereby remanded into the custody of the United States Marshal for this District for de-

livery to the Superintendent of the Federal Prison Camp, Dupont, Washington, for the purpose of executing said sentence. This judgment and sentence for all purposes shall take the place of a commitment, and be recognized by the Warden or Keeper of any Federal Penal Institution as such.

Done in open court this 21st day of October, 1942.

s/n Lloyd L. Black, United States District Judge.

Presented by J. Charles Dennis, United States Attorney.

Violation of Public Law #503, Curfew Act; and Civilian Exclusion Order No. 57.

[File endorsement omitted.]

[fol. 43] IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL AND GROUNDS OF APPEAL—Filed Oct. 23, 1942

Name and address of appellant: Gordon Kiyoshi Hirabayashi, 1417 E. 42nd St., Seattle, Wash.

Name and address of appellant's attorney: Frank L. Walters, 828 Central Building, Seattle, Washington.

Offense: Count I of indictment; a misdemeanor, to-wit: a violation of Public Law No. 503, Seventy-seventh Congress Chapter 191, Second Session, H. R. 6758, in that defendant-appellant as a person of Japanese ancestry on May 11, 1942 and May 12, 1942, knowingly remained in Military Area No. 1, as such area is defined by Public Proclamations Nos. 1 and 2, issued by J. L. De Witt as Lt. Gen., U. S. Army and as the Military Commander of the Western Defense Command Fourth Army, from which Military Area he was prescribed by Civilian Exclusion Order No. 57 issued by said Military Commander on May 10, 1942, and said defendant failed to report to the Civil Control Station located at Christian Youth Center, 2203 East Madison Street, Seattle, Washington, on Monday, May 11, 1942 and on May 12, 1942, [fol. 44] said Public Proclamations Nos. 1 and 2, and said Civilian Exclusion Order No. 57 having been ostensibly authorized by Executive Order No. 9066 of the President of the United States of America dated February 19, 1942; and as to

Count II of the Indictment; a misdemeanor, to-wit: a violation of Public Law No. 503, Seventy-seventh Congress, Chapter 191, Second Session, H. R. No. 6758, in that defendant as a person of Japanese ancestry, but a native born American citizen, knowingly remained away from and was not within this place of residence at Seattle, Washington on May 4, 1942 between the hours of 8:00 o'clock P. M., and 6:00 o'clock A. M. of May 5, 1942, which period is referred to as the hours of curfew, contrary to the provisions of paragraph 1, of Public Proclamation No. 3, of said J. L. DeWitt, Lt. Gen. of the United States Army as the Military Commander of the Western Defense Command, Fourth Army, said residence of the defendant then being within Military Area No. 1, as such area is defined and described in Public Proclamation No. 1 and Public Proclamation No. 3 of the Military Commander having been authorized ostensibly by Executive Order No. 9066 of the President of the United States of America dated February 19, 1942.

Date of Judgment: October 21, 1942.

Brief description of judgment or sentence: the defendant was found guilty on both of above counts of the indictment by the above entitled Court of the offenses therein charged and was committed to the custody of the Attorney General of the United States for imprisonment in the Federal Prison Camp, Dupont, Washington, or in such other like institution as the Attorney General of the United [fol. 45] States or his authorized representative may by law designate, for a period of three (30) months, as to each count of the indictment, said sentences and terms to run concurrently with each other and not consecutively.

Name of prison where defendant is now confined, if not on bail: King County Jail, at Seattle, Washington, and is not now on bail.

I, Gordon Kiyoshi Hirabayashi, Defendant and Appellant, do hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment and order above mentioned on the grounds set forth below.

Dated: October 23, 1942

s/n Gordon Kiyoshi Hirabayashi, Appellant.

Grounds of Appeal

1. The trial court erred in overruling defendant's amended demurrer and denying defendant's plea in abatement to the indictment and in refusing to sustain said

amended demurrer to the indictment and grant said plea in abatement of the indictment, and refusing to dismiss the indictment and action and to discharge the defendant, to all of which the defendant duly and regularly excepted and his exception was allowed.

2. That the trial court erred in denying defendant's motion made during the trial and at the opening of the government's case in chief before any evidence was introduced, to dismiss the action and discharge the defendant on the grounds that the indictment failed to state facts sufficient to constitute any offense or offenses with which the indictment attempts to charge the defendant, to which ruling the defendant duly and regularly excepted and his exception was allowed.

[fol. 46] 3. That the trial court erred in denying defendant's motion to dismiss the indictment and to render a judgment finding defendant not guilty of either offense charged in the two counts of the indictment and ordering him discharged, made during the trial and at the close of the government's case in chief, to the denial of which motion the defendant duly and regularly excepted and his exception was allowed.

4. That the trial court erred in denying defendant's motion to dismiss the indictment and to render a judgment finding him not guilty of either offense charged in the two counts of the indictment and ordering him discharged which was made during the court of the trial and at the close of the defendant's case, to which denial the defendant duly and regularly excepted and his exception was allowed.

5. That the trial court erred in denying defendant's motion in arrest of judgment made at the conclusion of the trial and immediately after the trial court found and pronounced the defendant guilty of the offenses charged in the two counts of the indictment, to which denial the defendant duly and regularly excepted and his exception was allowed.

6. That the trial court erred in denying the defendant's motion for a new trial made before the trial court pronounced and entered the judgment and sentence appealed from, to which denial the defendant duly and regularly excepted and his exception was allowed.

7. That the evidence is and was insufficient as a matter of law to sustain the finding of the trial court that the defend-

ant was guilty of either of the offenses charged in the two counts of the indictment.

Dated: October 23, 1942.

s/n Frank L. Walters, Attorney for the Defendant-Appellant.

[fol. 47] Office and Post Office Address: 828 Central Building, Seattle, Washington.

Endorsed: Received a copy of the within Notice of Appeal this 23 day of Oct., 1942, J. Charles Dennis, Attorney for Plaintiff.

[File endorsement omitted.]

[fol. 48] IN UNITED STATES DISTRICT COURT

ORDER AS TO SERVICE OF SENTENCE—Filed Oct. 26, 1942

The defendant above named having served and filed herein as required by law a Notice of Appeal to the United States Circuit Court of Appeal for the Ninth Circuit from the Judgment of guilty and sentence herein, and the defendant having elected to stay in the county jail of King County, Washington, or be admitted to bail, during the pendency of said appeal or further appeals, and not to serve said sentence herein or any portion thereof during the pendency of such appeal or appeals, it is hereby

Ordered that any time spent by the defendant during the pendency of said appeal or further appeals in the King County Jail or any Assembly Center of other institution shall not constitute the serving of the sentence herein nor be considered as applying upon the terms of said sentence, and the execution of the sentence and commitment thereunder is hereby stayed during the pendency of such appeal or appeals.

Dated at Seattle, Washington, this 26th day of October, 1942.

Lloyd L. Black, United States District Judge.

[fol. 49] Presented by: Frank L. Walters, Attorney for the Defendant.

Requested and Approved: Gordon Kiyoshi Hirabayashi, Defendant.

Copy of foregoing received.

J. Charles Dennis, U. S. District Attorney.

[File endorsement omitted.]

[fol. 50] IN UNITED STATES DISTRICT COURT

AFFIDAVIT IN FORMA PAUPERIS—Filed Oct. 23, 1942

UNITED STATES OF AMERICA,
Western District of Washington
State of Washington
County of King, ss:

Gordon Kiyoshi Hirabayashi, being first duly sworn, on his oath deposes and says: That he is an adult male, of the age of twenty-four years, a citizen of the United States of America by birth, and the party defendant above named and the appellant herein; that he neither owns or possesses any real property or any interest therein, and is the owner and possessed of personal property only, the reasonable value of which amount to not to exceed the sum of Fifty $50 Dollars, and consists of certain articles of wearing apparel and clothing, and articles of adornment, and the approximate sum of $5.00 in cash; that because of his poverty he is unable to pay the costs of this action and the costs of the appeal from the finding of guilty and order sentencing him to a term of three months on each count of the indictment in the Federal Prison Camp at Dupont, Washington, nor is he able to give security therefor; that he sincerely believes he is entitled to the redress he seeks in said appeal from said judgment of the trial court to the Circuit Court of Appeals for the Ninth Circuit; that the nature of his appeal is that said judgment of the trial court should be reversed for the reasons that the statute, Public Law No. 503 of the 77th Congress, Second Session, under which he was found guilty and received said sentence, is void for [fol. 51] *for* uncertainty and is also void and unconstitutional in that said statute and the military orders upon which the statute is based violate defendant's constitutional rights*k* privileges and immunities safeguarded and guaranteed by the Constitution of the United States, particularly by the 4th, 5th, 6th, 8th, 9th, 10th and 14th amendments thereto and that the defendant has herein been deprived of his rights, liberties, privileges and immunities without due process of law; that by reason of his poverty as aforesaid defendant is unable to pay the expenses of the preparation and certification of the record on appeal nor of having his briefs on appeal printed.

Wherefore, defendant prays for an order of the Court waiving the costs and expenses aforesaid and directing that the costs of said appeal and the expense of preparing and certifying and printing the record on appeal herein be paid by the United States of America and that the same be paid when authorized by the Attorney General as provided in 28 U. S. C. A. 832.

Dated: October 23, 1942.

Gordon Kiyoshi Hirabayashi, Affiant (Defendant and Appellant).

[fol. 52] Subscribed and sworn to before me this 23rd day of October, 1942. Frank L. Walters, Notary Public in and for the State of Washington, residing at Seattle. (Seal.)

Received a copy of the within Affidavit, IFP this 23 day of Oct. 1942.

J. Charles Dennis, Attorney for Plaintiff.

[File endorsement omitted.]

[fol. 53] IN UNITED STATES DISTRICT COURT

ORDER DISPENSING WITH PAYMENT OF FEES AND COSTS OF PRINTING RECORD ON APPEAL—Filed Oct. 23, 1942

Upon reading and filing of the affidavit in forma pauperis of the defendant herein, Gordon Kiyoshi Hirabayashi, appellant in the above entitled cause,

It is hereby ordered that the said defendant-appellant may, without being required to prepay the fees, costs and expenses for the printing of the record on appeal, prosecute and defend to conclusion in forma pauperis his appeal to the appellate Court or Courts from the judgment herein, and it is

Further ordered and directed that the expense of printing the record on appeal herein be paid by the United States of America, and that the same be paid when author-

ized by the —. Dated at Seattle, County of King, State of Washington, this 23rd day of October, 1942.

Lloyd L. Black, United States District Judge.

Presented by Frank L. Walters, Attorney for Defendant.

Received copy of the within Order this 23 day of Oct. 1942.

J. Charles Dennis, Attorney for Plaintiff.

Notice of presentment waived. J. Charles Dennis, U. S. Attorney.

[File endorsement omitted.]

[fol. 54] IN UNITED STATES DISTRICT COURT

BILL OF EXCEPTIONS

This cause came on regularly for trial on October 20, 1942 before the Honorable Lloyd L. Black, Judge of the above entitled Court, and a jury, and during the trial the following proceedings were had and testimony given and evidence offered and admitted or refused:

TESTIMONY OF SHUNTO HIRABAYASHI

After the jury had been selected and sworn, Shunto Hirabayashi was duly sworn as a witness on behalf of the plaintiff, but before any testimony was given, the defendant, by his counsel, moved the Court to quash or suppress all evidence in the action and to dismiss the indictment and discharge the defendant on the grounds that the indictment failed to state facts sufficient to constitute any crime or offense, and that the defendant had been deprived of liberty and property without due process of law, and that Executive Order No. 9066, the Proclamations 2 and 3, and Civilian Exclusion Order #57 of the Military Commander, and Public Law #503, are all unconstitutional and void. The motion was by the trial Court denied to which the defendant excepted and his exception allowed.

Said Gordon Hirabayashi t-en testified that he was born in Japan as was his wife, Mitsu Hirabayashi; that they are

the father and mother respectively of the defendant here; on cross-examination, he testified that he and his wife were converted to the Christian religion before coming to the United States; that witness came to the United States in 1909 and his wife in 1914; that neither of them have ever been back to Japan, and neither he nor his wife have since had any connection with the Empire of Japan since coming to this country.

[fol. 55] TESTIMONY OF TOM G. RATHBONE

Witness Tom G. Rathbone was then sworn and testified that the defendant did not report at the Civil Control Station located at Christian Youth Center, 2203 East Madison Street, Seattle, Washington, on Monday, May 11, 1942, nor did he report at said Civil Control Station on May 12, 1942. That on May 16, 1942, he voluntarily came to the office of the U. S. Employment Service, of which the witness was an officer, in the company of Special Agent H. H. McKee of the Federal Bureau of Investigation; that defendant admitted he knew of the evacuation orders and regulations to report to the Civil Control Station, but had not reported there on either May 11, or May 12, 1942, to register for evacuation because he, defendant, believed the evacuation orders and regulations were unconstitutional and deprived him, as a native born American citizen of his rights under the Constitution, and he could not, therefore, in good conscience, obey the orders and waive his rights as an American citizen; that defendant was told that if he did not then register for evacuation, charges would have to be preferred against him, and defendant again said he could not, believing as he did that his rights as an American citizen were being or would be violated if he obeyed the orders, register and submit to the unlawful evacuation orders.

TESTIMONY OF H. H. MCKEE

H. H. McKee, Special Agent of the F. B. I. was then sworn as a witness for the plaintiff and testified that defendant came to the office of the Federal Bureau of Investigation at Seattle, on May 16th, 1942, and voluntarily went with the witness to the office of witness Rathbone, and witness McKee's testimony corroborated that of witness Rathbone above delineated; that defendant was honest and [fol. 56] above board in the matter and had told the wit-

ness when defendant had voluntarily come to the F. B. I. office that defendant could not voluntarily obey the evacuation orders because he believed them unlawful and that they deprived him of his rights under the Constitution as an American citizen.

Testimony of Floyd Schmoe

Floyd Schmoe, sworn as a witness for the plaintiff, testified that during the month of May 1942 the residence of defendant was Eagleson Hall, 1417 East 42nd Street, Seattle, Washington. That on the evening of May 9, 1942 defendant left his residence after eight o'clock p. m. and did not return to said residence until after six o'clock on the morning of May 10, 1942; that defendant had said he had not obeyed the curfew regulations because he believed they were unconstitutional and to obey them would be a waiving of his rights as an American citizen under the Constitution. Ralph Seaton corroborated the testimony of witness Schmoe.

Testimony of Captain Michael Revisto

Captain Michael Revisto, officer of the U. S. Army in Charge of Japanese evacuation in Seattle under Lt. Genl. J. L. DeWitt, was sworn as a witness for the plaintiff and testified to having a conversation of some length with the defendant, trying to persuade the defendant to change his mind and voluntarily submit to the evacuation orders and avoid criminal litigation over his refusal, but that again and again defendant told the witness that defendant had been raised by his parents and taught during his education that he, as an American citizen, born in the United States, had the same rights and liberties as all other American citizens have, and that to voluntarily obey the evacuation orders would be a waiving of those rights, which he could not conscientiously do.

Testimony of Arthur G. Barnett

Arthur G. Barnett was sworn and testified for the plaintiff that he had counseled with defendant as his friend, and defendant had told him defendant could not, feeling as he [fol. 57] did about his constitutional rights as an American citizen, voluntarily obey the evacuation orders.

Plaintiff rested.

Motion for Directed Verdict and Denial Thereto

Defendant here challenged the sufficiency of the evidence to prove either of the offenses charged, and moved the court to dismiss the action and discharge the defendant. The motion was denied, defendant excepted and his exception was allowed.

Testimony of Gordon Kiyoshi Hirabayashi

Defendant was sworn as a witness in his own behalf and testified that he was born in Seattle, King County, State of Washington April 23, 1918; that he was educated in the public schools of King County and Seattle and was a senior at the University of Washington, at the time of his incarceration in the county jail in May, 1942, majoring in mathematics; that he has never been to Japan nor had any connection of any kind with the Japanese living in Japan; that his parents had always taught him and his brothers and sisters that they are American citizens and how to conduct themselves as such; that he has been active in the Boy Scout movement, having been a life scout in a troop of Japanese boys and assistant scout master, and was active in and at one time vice-president of the Y. M. C. A. at the University of Washington, and had attended student Y. M. C. A. conferences in other states as the representative of the University Y. M. C. A.; that in those organizations and in the schools and university he had learned what is expected of good American citizens, and what his rights are as such an American citizen, and he had at all times tried earnestly to conduct himself as one; that he had never before been arrested on any charge whatever; that he had not reported to the Civil Control Center nor remained in his residence during the curfew hours because he honestly believed that the evacuation and curfew orders were and are [fol. 58] unconstitutional and violated his rights as an American citizen, and that for him to voluntarily obey them would be a waiver of his rights, that believing as he did and does his conscience would not let him voluntarily submit to orders which he believed unlawful, especially since he believed that the orders discriminated against him and other American citizens of Japanese ancestry on the basis of race and color, which he had been taught to believe is against one of the fundamental principles upon which our government is founded; that he believed it to be his right

and duty as an American citizen to defend his action in order that he might have the constitutional questions involved properly raised and determined in a court of law.

Testimony of M. D. Woodbury

M. D. Woodbury was sworn as a witness on behalf of the defendant, and testified that he had known defendant during the past two to three years while the witness was the Secretary-manager of the University of Y. M. C. A. and while defendant roomed in the dormitory of that Y. M. C. A.; that defendant at all times had conducted himself as a law abiding American citizen, was a leader in the Y. M. C. A. and other student organizations and affairs, and was well respected among his fellow students and the staff of the Y. M. C. A., and bore a very fine reputation among the people of the community.

Defendant offered in evidence Deft's Exhibit A-1; objection of the plaintiff to its admission was sustained; defendant excepted, and his exception was allowed.

Defendant rested. Plaintiff rested.

[fol. 59] Motion for Directed Verdict and Denial Thereof

Defendant again challenged the sufficiency of the evidence to prove the commission of either offence in the indictment, that the indictment did not state facts sufficient to constitute any crime charged, and moved the Court to dismiss the action or direct a verdict of not guilty and discharge the defendant. The motion was over-ruled and denied, to which defendant duly excepted and his exception was allowed.

After argument of counsel the Court instructed the jury and the jury retired to consider its verdict.

Defendant, through his counsel, then took exceptions to the refusal of the Court to give Defendant's requested instructions, and further excepted to the instructions given by the court on the grounds that they were against the law and the evidence, that they amounted in effect to instruction to the jury to bring in a verdict of guilty on both counts, which it was improper for the court to do, and on the further grounds that the instructions or the law were erroneous because of all the grounds raised on defendant's amended demurrer to the indictment and that the court

erred in taking judicial notice of Executive Order #9066, Public Proclamations 2 and 3 and Civilian Exclusion Order #57 of the Military Commander as they were unconstitutional and void, and that Public Law #503 under which the action was prosecuted was not a valid criminal statute.

After the return of the verdict of guilty on both counts the defendant, on November 21, 1942 moved the court for a [fol. 60] new trial, on the grounds stated therein; that motion was denied by the court, defendant excepted to the Court's ruling, and his exception was allowed.

The Court then adjudged the defendant guilty of each offense charged in the two counts of the indictment.

Defendant then moved the Court in arrest of judgment and sentence on the grounds that the defendant had not been granted a fair trial and his constitutional rights had been violated. The motion was denied and the defendant excepted to the Court's ruling and his exception was allowed.

The Court then announced orally the sentence of the Court and the same was committed to writing and signed by the Court.

Defendant took exception to the imposition of any sentence on him.

[fols. 61-62] JUDGE'S CERTIFICATE

UNITED STATES OF AMERICA,
State of Washington,
County of King, ss:

I. Lloyd L. Black, Judge of the District Court of the United States for the Western District of Washington, Northern Division, and the Judge before whom the foregoing cause entitled, "United States of America, plaintiff, vs. Gordon Kiyoshi Hirabayashi, defendant," was heard and tried with a jury, do hereby certify that the matters and proceedings embodied in the foregoing Bill of Exceptions are matters and proceedings occurring in the said cause and attached to the Bill of Exceptions contains all of the material facts, matters and proceedings heretofore occurring in said cause not already a part of the record therein; and I further certify that the said Bill of Exceptions, together with the exhibits admitted and the exhibits offered and refused, and on file herein in said cause and attached to the Bill of Exceptions contains all of the

material facts, matters and proceedings heretofore occurring in said cause not already a part of the record therein; and said Bill of Exceptions and the exhibits attached thereto are made a part of the record in said cause, the Clerk of the Court being hereby instructed to attach all exhibits admitted and offered and refused admission, thereto.

Counsel for the respective parties being present and concurring herein I have this day signed this Bill of Exceptions.

In witness whereof, I have hereunto set my hand on this 2nd day of November, 1942.

Lloyd L. Black, Judge of the District Court of the United States.

[fol. 63] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed November 2, 1942

Comes now the defendant, by Frank L. Walters, his attorney herein, and for the purpose of assigning the errors which he claims the Court committed in this cause and proceeding and the trial thereof, hereby makes the following Assignment of Errors, to-wit:

1. That the Court erred in overruling the amended demurrer of the defendant to the indictment and each count thereof.

2. The Court erred in denying the defendant's plea in abatement of the indictment.

3. The Court erred in entering herein an order overruling said amended demurrer to and denying defendant's plea in abatement of the indictment.

4. The Court erred in refusing to sustain defendant's motion made at the opening of the trial and before any testimony or evidence was admitted, to dismiss the action on the grounds stated in the motion, and in denying said motion, to suppress all evidence in the case.

5. The Court erred in refusing to sustain defendant's challenge to the sufficiency of the evidence made the con-

clusion of the plaintiff's case and in refusing to grant defendant's motion made at the same time, to dismiss the [fol. 64] action and discharge the defendant as neighter offense charged in the indictment had been proven, and to direct a verdict of acquittal.

6. The Court erred in denying defendant's motion for a directed verdict of acquittal made the conclusion of the trial after both parties had rested.

7. The Court erred in denying defendant's motion in arrest of judgment and sentence made after defendant had been adjudged guilty.

8. The Court erred in refusing to give defendant's requested or proposed instructions to the jury.

9. The Court erred in refusing to admit in evidence Deft's Exhibit A-1 which defendant offered in evidence.

10. The Court erred in entering judgment and sentence against the defendant.

S/N Frank L. Walters, Attorney for the Defendant.

Endorsed:
Received a copy of the within Assignment of Error this 31 day of Oct. 1942, J. Charles Dennis, Atty. for pltf.

[File endorsement omitted.]

[fol. 65] IN UNITED STATES DISTRICT COURT

PRAECIPE FOR RECORD ON APPEAL—Filed October 28, 1942

To the Clerk of the above entitled Court:

Please prepare a Record on Appeal for the appeal of the above entitled cause and the judgment and sentence therein to the Circuit Court of Appeal of the United States for the Ninth Circuit, and for that purpose please prepare the following:

1. May 28, 1942 Indictment.
2. June 1, 1942 Arraignment and Plea of not guilty.
3. June 1, 1942 Entry—Order allowing motion and demurrer to be filed within ten days.

4. June 11, 1942 Order of appearance of Frank L. Walters, for Defendant.

5. June 22, 1942 Entry—Order allowing defendant to file within one week a motion to make more definite and certain and amended demurrer to indictment.

6. June 29, 1942 Amended Demurrer and Plea in Abatement.

7. Sept. 15, 1942 Memorandum Opinion of the Court.

8. Sept. 24, 1942 Order denying plea in abatement and overruling amended Demurrer.

9. Oct. 17, 1942 Supplement to Memo Opinion.

10. Oct. 20, 1942 Verdict of the Jury.

11. Oct. 20, 1942 Requested Instruction of Defendant.

12. Oct. 21, 1942 Motion for New Trial.

13. Oct. 21, 1942 Entry—Motion for New trial denied.

[fol. 66] 14. Oct. 21, 1942 Judgment and Sentence.

15. Oct. 23, 1942 Notice of Appeal.

16. Oct. 23, 1942 Affidavit in forma pauperis.

17. Oct. 23, 1942 Order dispensing with payment of costs, etc., on appeal.

18. Oct. 26, 1942 Order re time spent in jail and staying execution.

19. Nov. 2, 1942 Bill of Exceptions.

20. Nov. 2, 1942 Assignment of Errors.

Frank L. Walters, Attorney for the Defendant.

[File endorsement omitted.]

[fols. 67-68] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 69] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 10308

GORDON KIYOSHI HIRABAYASHI, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

APPELLANT'S STATEMENT OF POINTS—Filed Nov. 25, 1942

[fol. 70] Appellant relies upon the following points and the authorities cited:

1. That Executive Order #9066, as applied by Public Proclamations 1, 2 and 3 and Civilian Exclusion Order #57 of the Military Commander to American citizens, is unconstitutional and void as attempted legislation not authorized by the Congress in the Alien Enemy Act (Title 50, secs. 21-24, U. S. C. A.)

Art. 1, sec. 1 and sec. 8, cls. 1, 14 and 15, Constitution;
Muir v. Louisville & N. R. Co., 277 Fed. 888;
Schechter Poultry Co. v. U. S., 295 US 495; 97 L. ed. 1570;
U. S. v. Wong Kim Ark, 169 US 649; 42 L. ed. 890.

2. That Public Proclamations 1, 2 and 3 and Civilian Exclusion Order #57 of the Military Commander, on their faces and as applied to American citizens, are unconstitutional and void as exceeding the powers delegated either by the Alien Enemy Act or Executive Order #9066.

Art. 1, sec. 1, and sec. 8, cls. 1, 14 and 15, Constitution;
Field v. Clark, 143 US. 649;
Panama Refining Co. v. Ryan, 293 US. 388;
Schechter Poultry Co. v. U. S., supra.

3. That said Public Proclamations and Exclusion Order are unconstitutional and void in creating military areas or zones and defining crimes when martial law has not been declared and does not exist in Washington.

Bishop v. Vandercook, 228 Mich. 299; 200 N. W. 278;
Ex parte Gilroy, 257 Fed. 110;
Ex parte Milligan, 4 Wall (US) 2; 18 L. ed. 27;
Ex parte Quirin, U. S. Supreme Court, October 29, 1942;
Hamilton v. Kentucky Distillery, 40 US. 108;
Home Bldg. & Ln. Asstn. v. Blaisdell, 290 US. 398;
Sterling v. Constentin, 287 U. S. 387, 77 L. ed. 375;
U. S. v. L. Cohen Grocery Co., 255 US. 81, 65 L. ed. 516;
U. S. v. Yasui, supra.

[fol. 71] 4. That said executive order and public proclamations and exclusion order, on their faces and in their application to appellant and all other American citizens, are unconstitutional and void, because they deny appellant and all other American citizens "due process of law" and "equal protection of the laws".

Fifth Amendment to the Constitution;
Sixth Amendment to the Constitution;
Felts v. Murphy, 201 US. 123, 50 L. ed. 689;
Ong Chang Wing v. U. S., 218 US. 272, 54 L. ed. 1040;
Truax v. Corrigan, 257 US. 312, 66 L. ed. 254;
U. S. v. Yasui, supra.

5. That said executive order, proclamations and exclusion order are on their faces and as applied to appellant and other American citizens of Japanese ancestry, unconstitutional and void as class legislation in that they:

(a) Class American citizens as and with Alien Enemies.

Brown v. U. S., 8 Cranch. 110;
Ex parte Milligan, supra;
Sims v. Rives, 84 Fed. (2) 871; cert. denied 298 US 682.

(b) Create a discrimination based upon Race or Color.

American Sugar Refg. Co. v. Louisiana, 179 US. 89, 45 L. ed. 102;
Buchanan v. Warley, 245 US. 60, 62 L. ed. 149;
City of Richmond v. Deans, (CCA) 37 Fed. (2) 712;
Harmon v. Tyler, 273 US. 668, 71 L. ed. 831;
Irvine v. City of Clifton Forge, (va) 97 S. E. 310;

Yick Wo v. Hopkins, 118 US. 356; 30 L. ed. 220;
Yu Cong Eng v. Trinidad, 271 US. 500, 70 L. ed. 1059.

6. That Public Law #503, 77th Cong. 2nd Sess., c. 191, by its application through the military exclusion order, is unconstitution- and void upon the following grounds:

(a). It is a Bill of Attainder.

Art. I, sec. 9, cl. 3 of the Constitution;
11 A. J. 1175.

(b). It attempts to create a Title of Nobility.

[fol. 72] Art. 1, sec. 9, cl. 7.

(c). It creates involuntary servitude.

Thirteenth Amendment to the Constitution.

(d). By classifying American citizens with Alien enemies it convicts American citizens of treason or an intent to commit treason against the United States of America.

Art. III, sec. 3, of the Constitution.
Ex parte Bollman, 4 Cranch 75, 2 US (L. ed) 554.

(e). By exclusion and internment of American citizens without the issuance of a warrant according to law, constitutes an Unreasonable Seizure of the person of the American citizen, and this appellant.

Fourth Amendment of the Constitution;
Boyd v. U. S., 116 US. 616, 29 L. ed. 746;
Newberry v. Carpenter, (Mich) 65 N. W. 630; 61 A. S. R. 346;
Stantenbaugh v. Frazier, 16 App. Cas. (D. C.) 229, 48 LRS. 220;
Weeks v. U. S., 232 US. 383, 58 L. ed. 652;
24 R. C. L. 707, sec. 9.

7. Public Law #503, 77th Cong. 2nd sess., is unconstitutional and void on its face for the following reasons:

(a) It is too indefinite and uncertain to constitute a valid criminal statute.

Connally v. General Const. Co., 269 US. 385, 70 L. ed. 322;
Ex parte Rocquemore, (Tex) 131 S. W. 1101; 32 LRS (NS) 1186;

U. S. L. Cohen Grocery Co., 255 US 81, 65 L. ed. 516;
U. S. v. Brewer, 139 US. 278, 35 L. ed. 190.

(b). It attempts to delegate to the courts and juries the power to define a crime.

Art. I, sec. 1, of the Constitution;
U. S. v. L. Cohen Grocery Co., supra.

[fols. 73-91] 8. The application of the military proclamations and exclusion order and Public Law #503 have deprived the appellant and all other American citizens of his race of those fundamental rights, privileges and immunities, guaranteed by the Constitution, which are "so vital to the maintenance of democratic institutions" (Schneider v. Irvington, 308 US. 147), which are the "immutable principels of justice which inhere in the very idea of free government" (Holden v. Hardy, 169 US. 366) and which are the fundamental rights which belong to every citizen as a member of society" (U. S. v. Cruikshank, 92 US. 542), and are those "certain inalienable Rights" with which "all men ——— are endowed by their Creator" and among them are "Life, Liberty and the Pursuit of Happiness" (The Declaration of Independence).

Frank L. Walters, Attorney for the Appellant.

[fol. 92] Supreme Court of the United States

[Title omitied]

No. 870 October Term 1942

Order Directing that Entire Record Be Certified—April 5, 1943

In accordance with section 239 of the Judicial Code (28 U. S. C., section 346), it is ordered that the entire record in this case be certified up to this Court so that the whole matter in controversy may be considered by the Court.

FILE COPY

MAY 8 1943

CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1942

No. 870

GORDON KIYOSHI HIRABAYASHI,

Appellant,

against

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT

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IN THE

Supreme Court of the United States

OCTOBER TERM 1942

No. 870

GORDON KIYOSHI HIRABAYASHI,

Appellant,

against

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT

---

1. Opinions Below

The opinion of the District Court on demurrer will be found in 46 F. Supp. 657 and at pages 9-18 of the record.

The Circuit Court of Appeals for the Ninth Circuit has certified questions to this Court, Judge Denman dissenting. The certificate and Judge Denman's dissenting opinion have not yet been officially reported. They have not been printed in the record but will be found in the appendix to this brief, pages 33-48.

2. Jurisdiction

Jurisdiction of this Court to answer certified questions is founded on Judicial Code § 239 (28 U. S. C. A. 346). In addition the case is here under § 239 on the order of this Court to bring up the entire record (R. 43).

3. Statement of the Case

Appellant, a native born citizen, was indicted under the Act of Congress of March 21, 1942 (18 U. S. C. A. 97A), for failure to obey certain military orders issued by Lt. Gen. DeWitt, namely, that, being of Japanese ancestry, he must observe certain curfew regulations and report to a control station for the purpose of being evacuated from his home in Seattle, Washington. Appellant challenged the constitutionality of the military orders and of the Act of Congress by demurrer (R. 5) and plea in abatement (R. 8). These having been overruled (R. 19), appellant stood trial, renewed his objections by appropriate motions (R. 35), but was convicted and sentenced to three months' imprisonment (R. 24).

Appellant was born and has always lived in Seattle. While his parents were born in Japan, neither of them ever returned to that country or maintained any relations with it (R. 32). Appellant was brought up to consider himself an American only. He has been active in the Y. M. C. A. and the Boy Scout movement. At the time of his arrest he was a senior at the University of Washington (R. 34).

Appellant has not sought to evade any responsibility imposed upon him by law. He openly reported to government agencies advising them that he would not obey the military orders in question because he considered them to be violations of his constitutional rights as an American citizen (R. 32).

The military orders were issued by Gen. DeWitt in purported reliance on an order issued by President Roosevelt on February 19, 1942 (Executive Order 9066, *infra* p. 23). This provided, among other things, that the various military commanders might establish "military areas", from which "any or all persons may be excluded". On March 2, 1942, Gen. DeWitt created Military Area No. 1, which covered the entire West Coast, including the area

in which appellant lived (Public Proclamation No. 1, *infra* p. 25). On March 24, 1942, the General imposed curfew restrictions on "all persons of Japanese ancestry", which compelled them to remain in their homes between 8 P. M. and 6 A. M. and prohibited travel beyond five miles from their homes (Public Proclamation No. 3, *infra* p. 27). The second count in the indictment charged appellant with the violation of the curfew part of that order (R. 2).

Exclusion orders were issued from time to time covering various areas, and were 105 in number. (See Public Proclamation No. 7, June 8, 1942, *infra* p. 29). Number 57 (*infra* p. 33) affected the area in which appellant resided and was issued on May 10, 1942 (R. 13). The first count of the indictment charged appellant with failure to obey this particular exclusion order (R. 1).

No martial law has been declared in the affected areas, nor has the functioning of the ordinary courts of justice been in any way impaired, or the writ of habeas corpus suspended.

In the meantime Congress passed the law on which the indictment was based. It provides:

> "*Public Law #503:*
>
> Whoever shall enter, remain in, leave, or commit any act in any military area or military zone prescribed under the authority of an Executive Order of the President, by the Secretary of War, or by any military commander designated by the Secretary of War, contrary to the restrictions applicable to any such area or zone, or contrary to the order of the Secretary of War or any such military commander, shall if it appears that he knew or should have known of the existence and extent of the restrictions or order and that his act was in violation thereof, be guilty of a misdemeanor and upon conviction shall be liable to a fine of not to exceed $5,000, or to imprisonment for not more than one year, or both, for each offense." (Act of March 21, 1942, 18 U. S. C. A. 97A.)

Appellant challenged this law on the ground that it was too vague to be enforcible, that it improperly delegated

legislative power to the military authorities, and on other grounds not necessary to detail here (R. 5-7). He challenged the military orders he was charged with disobeying on the ground that they were not authorized by law; on the ground that they deprived him of due process of law because involving discrimination based on race, and because they denied him any hearing; on the ground that they subjected to military authority civilians over whom the military had no jurisdiction and on the ground that they authorized an unreasonable seizure of his person (R. 5-8). Finally appellant challenged the Executive Order under which the military commander purported to act on the ground that it was not authorized by law and was beyond the constitutional power of the President (R. 6).

The Circuit Court of Appeals, after hearing argument, certified the following questions to this Court:

> "1. Was Lt. Gen. DeWitt's Civilian Exclusion Order No. 57 of May 10, 1942, excluding all persons of Japanese ancestry, including American citizens of Japanese ancestry, from and after 12 o'clock noon, May 16, 1942, from a particular area in Seattle, Washington, within Military Area No. 1 established by General DeWitt's Proclamation No. 1 of March 2, 1942, and requiring a responsible member of each family, and each individual living alone, affected by the order to report on May 11 or 12, 1942, to the Civil Control Station in the said area in connection with said exclusion, a constitutional exercise of the war powers of the President derived from the Constitution and statutes of the United States.
>
> 2. Was Lt. Gen. DeWitt's Public Proclamation No. 3 of March 24, 1942, requiring all alien Japanese, Germans and Italians and all persons of Japanese ancestry, including American citizens of Japanese ancestry, residing or being within the geographical limits of Military Area No. 1 established by Public Proclamation No. 1 of March 2, 1942, to be within their place of residence between the curfew hours of 8:00 p. m. and 6:00 a. m. daily, a constitutional exercise of the said war powers.

3. If the answer to question One or the answer to question Two is in the affirmative, did the Act of March 21, 1942 (18 U. S. C. 97A), constitutionally make it a criminal offense for the appellant wilfully and knowingly to fail to report to the Civil Control Station as ordered or to remain outside of his place of residence during the curfew hours."

Under these and similar military orders the entire Japanese population of the West Coast, more than 110,000 men, women and children, 70,000 of whom were citizens, were torn from their homes, occupations and schools and forced to remain in camps surrounded by barbed wire and guarded by soldiers.[1] Their property interests were liquidated, the right of citizens to vote effectively impaired. For a time the Army even refused to draft the men of military age. While today the situation is somewhat improved the improvements benefit relatively few. Provision has been made for the release of individuals who can find placement outside the banned areas. Most of those evacuated cannot avail themselves of this privilege and will remain in the camps until the war is over.

Few of those evacuated have resisted the process. It is so much simpler to bow to superior force than to stand on constitutional rights. Yet here and there some individuals have asserted their rights. Sometimes, as in the cases now before the Court, the issue has arisen in criminal prosecutions instituted for refusal to obey orders. In one case indeed a strange spectacle was presented of a prosecution based on voluntary removal of a citizen from the proscribed area (*Ex parte Kanai*, 46 F. Supp. 286). In a few cases habeas corpus proceedings have been instituted. An attempt in this manner to challenge the curfew regulations failed on the ground that these imposed no present restraint of liberty (*Ex parte Ventura*, 44 F. Supp. 520).

---

[1] The story has been told by the Tolan Committee of the House of Representatives (77th Congress, 2d Session, House Report 2124, pp. 59 ff.). See also Reports of War Relocation Authority and 51 Yale L. J. 1316, 1324 ff.

Some individuals vainly sought release from the camps. In addition to these mass evacuation orders the military authorities, both on the East Coast, and the West, have issued orders directing individual citizens to leave those areas.[2] Some of these orders are now being tested in the courts.

It is significant that no charge of espionage, sabotage or treasonable activity had been made against any American citizen of Japanese ancestry at the time of the evacuation order here in question. This was conceded by government counsel during the argument in the Circuit Court.

The total number of citizens evacuated from the West Coast was less than one percent of the population of the affected areas,[3] in sharp contrast with the situation in Hawaii where the danger was much greater both because of the larger Japanese population and its relative closeness to the enemy.[4]

No sabotage was committed in Hawaii at any time. James Rowe, Jr., Assistant to the Attorney General, wrote April 20, 1942, "Mr. John Edgar Hoover, Director of the Federal Bureau of Investigation, has advised me there was no sabotage committed there [in Hawaii] prior to December 7, on December 7, or subsequent to that time." (House Report 2124, p. 49.)

Immediately after Pearl Harbor martial law was declared and has been in force ever since in Hawaii. There was no evacuation of persons of Japanese ancestry though

---

[2] See statement by General Drum, House Report, footnote [1] *supra*, p. 35.

[3] Adding the population of Portland, Oregon, 305,000, and that of Seattle, Washington, 368,000, to that of California, 6,907,000, gives a total of about 7,500,000 as against about 70,000 citizens evacuated.

[4] In Hawaii the total number of persons of Japanese ancestry in 1941 was 159,534, comprising 34.2% of the total population. Of these 35,183 were foreign-born, comprising 7.5% of the total population, and the remainder, 124,351, or 26.7% of the total population, were American born citizens.

a number of Japanese aliens have been interned and special regulations promulgated for the alien Japanese. No restrictions have been placed upon American citizens of Japanese descent not applicable to other American citizens, except restrictions on Japanese broadcasts and newspapers and the barring of persons of Japanese ancestry from certain districts. The good results which followed this manner of handling the problem is reflected in a statement made by General Emmons on January 28, 1943:

> "Once in a great while an opportunity presents itself to recognize an entire section of this community for their performance of duty. All of the people of the Hawaiian Islands have contributed generously to our war effort. Among these have been the Americans of Japanese descent. Their role has not been an easy one. Open to distrust because of their racial origin, and discriminated against in certain fields of the defense effort, they nevertheless have borne their burdens without complaint and have added materially to the strength of the Hawaiian area.
>
> "They have behaved themselves admirably under the most trying conditions, have bought great quantities of war bonds, and by the labor of their hands have added to the common defense." (Quoted in Foreword to "The Japanese in Hawaii Under War Conditions", by Andrew W. Lind.)

Specification of Assigned Errors

It is intended by appellant to urge the following assignments of error: Nos. 1-7 (R. 37, 38).

In substance these assignments challenge the validity of the law under which appellant was convicted and the orders he was charged with violating.

Summary of Argument

1. Appellant contends that the statute under which he was convicted is void because it is too vague and because, if construed to authorize the military orders, it unlawfully delegates legislative power to the military and improperly authorizes control over civilians by military authority.

2. He contends, moreover, that the military orders he is charged with having disobeyed were not authorized by law, or if authorized, they are unconstitutional as applied. Appellant urges that these orders deprive him of liberty without due process of law because no hearing machinery is established by which he can establish his loyalty and because they arbitrarily discriminate against him because of his race. He urges further that the orders purport to authorize an unreasonable seizure of his person contrary to the Fourth Amendment. Appellant disputes the power of the military authorities to act in the premises in the absence of a proper declaration of martial law.

POINT I

The Act of Congress of March 21, 1942, is unconstitutional.

Appellant contends that this law violates the due process clause of the Fifth Amendment because of its vagueness and violates Article I, §I, because legislative power is delegated to the military. He claims also that it is invalid because it vests the military with power over civilians not authorized by the Constitution.

(a) The statute is too vague to be enforcible.

It is settled by numerous decisions of this Court that a law which imposes criminal sanctions must contain in its

own language a sufficiently precise definition of what is being punished so that persons affected may know whether or not they are violating it.

> *United States* v. *Cohen Grocery Co.*, 255 U. S. 81.
> *Connally* v. *General Construction Co.*, 269 U. S. 385.
> *Lanzetta* v. *New Jersey*, 306 U. S. 451.

Certainly a statute which punishes "any act" committed in violation of a military order of undefined scope and extent is vague beyond the shadow of a doubt. Moreover, the law places the citizen in the gravest dilemma, because it punishes him if he remains in the proscribed area and also if he leaves it. And that this is not an idle form of words is apparent from the *Kanai* case (46 F. Supp. 286).

(b) The statute unlawfully delegates legislative power.

No statute, if it be not this one, gives the military authorities any power over civilians in the absence of martial law. Certainly the Articles of War do not (10 U. S. C. A. 1471-1593). It is evident from a mere inspection of this law that Congress has laid down no standards by which the military authorities may be guided either in their definition of military areas or in their determination of what restrictions should be imposed on the movement of civilians in the areas. The military are, in effect, given carte blanche to legislate on these subjects without restraint.

Surely that is delegation "run riot" more than even in *Schechter Poultry Co.* v. *United States*, 295 U. S. 495. There only property rights were affected and by civilian agencies; here personal rights of the utmost importance have been destroyed and by military action alone. See also *Panama Ref. Co.* v. *Ryan*, 293 U. S. 388. As this Court said in the *Schechter* case:

> "We recently had occasion to review the pertinent decisions and the general principles which govern the determination of this question. (Citing *Panama Refining Co.* v. *Ryan.*) The Constitution provides that 'All

legislative powers herein granted shall be vested in a Congress of the United States.' • • •. The Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested. We have repeatedly recognized the necessity of adapting legislation to complex conditions involving a host of details with which the national legislature cannot deal directly. We pointed out in the *Panama Company* case that the Constitution has never been regarded as denying to Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the Legislature is to apply. But we said that the constant recognition of the necessity and validity of such provisions, and the wide range of administrative authority which has been developed by means of them, cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained." • • • (p. 529).

"But Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade or industry" (p. 537).

It may be argued that criminal sanctions for violation of administrative orders are not new and have generally withstood challenge. But it will be found, on analysis of such cases, that they in no way resemble this one. Consider, for instance, the applicable provision of the Selective Service Act (50 U. S. C. App. 311). Draft boards have power to issue orders which if wilfully disobeyed subject the registrant to punishment. But no draft board can decide for itself what classes of citizens are to be drafted. Congress has carefully set up standards for the control of the draft board's actions. It has legislated on the subject, has not given the boards any power of legislation whatever. Moreover, each affected individual has a

hearing, with opportunities for review of possible errors in administration.

Here, however, there are neither standards nor protective hearings. Unless this statute be the foundation of the orders the military have issued there is no legal foundation for them. And if the Act of March 21, 1942, be relied on it is clearly invalid as an unlawful delegation of legislative power.

(c) The statute gives the military excessive power over civilians.

The Act of March 21, 1942, purports to authorize military officers to establish military areas and zones, to bar persons from such areas, to compel them to remain in the areas and to prohibit persons from doing "any act" therein. Such broad powers are unprecedented. We submit that they are unconstitutional.

We believe it to be incontrovertible that Congress has no constitutional power to grant the military authorities control over civilians except under conditions where martial law may prevail. The subject of military power was exhaustively considered by this Court in *Ex parte Milligan*, 4 Wall. 2. There Chief Justice Chase pointed out that there were three situations in which the army might rule:

> "There are under the Constitution three kinds of military jurisdiction: one to be exercised both in peace and war; another to be exercised in time of foreign war without the boundaries of the United States, or in time of rebellion and civil war within states or districts occupied by rebels treated as belligerents; and a third to be exercised in time of invasion or insurrection within the limits of the United States, or during rebellion within the limits of states maintaining adhesion to the National Government, when the public danger requires its exercise. The first of these may be called jurisdiction under MILITARY LAW, and is found in acts of Congress prescribing rules and articles of war, or otherwise providing for the government of the national forces; the second may be distinguished

> as MILITARY GOVERNMENT, superseding, as far as may be deemed expedient, the local law, and exercised by the military commander under the direction of the President, with the express or implied sanction of Congress; while the third may be denominated MARTIAL LAW PROPER, and is called into action by Congress, or temporarily, when the action of Congress cannot be invited, and in the case of justifying or excusing peril, by the President, in times of insurrection or invasion, or of civil or foreign war, within districts or localities where ordinary law no longer adequately secures public safety and private rights" (p. 141).

Clearly no one of the three situations justifies the law here enacted. It does not, as do the Articles of War (10 U. S. C. A. 1471 ff.), deal with the rights and duties of members of the armed forces, what the Chief Justice called "military law". It does not deal with occupied areas, what he called "military government". It does not deal with "martial law". On the contrary, this statute purports to create a new kind of military power not authorized by the Constitution. We believe that on this phase of the case the views expressed by Judge Fee in *United States* v. *Yasui*, 48 F. Supp. 40, 47, 48, are sound.

We submit, therefore, that this statute is void. If we are correct in this view, the conviction cannot be sustained and it becomes unnecessary for this Court to consider the validity of the particular military orders.

POINT II

The military orders under consideration are unauthorized by law and unconstitutional.

While this case can be disposed of by a ruling voiding the Act of Congress under which the conviction of appellant was obtained, the real questions of interest in this and similar cases relate to the validity of the military orders.

We start with certain uncontrovertible facts: First, that appellant and all other persons born in the United States are citizens, regardless of their race or ancestry (*United States* v. *Wong Kim Ark,* 169 U. S. 649). Second, that Congress has vested no one with authority to detain citizens merely because a war is on (Alien Enemy Act, 50 U. S. C. A. 21, is the only applicable statute and that does not extend to citizens). Third, that martial law may not operate in areas not subject to actual invasion or disorder and in which the ordinary courts are functioning (*Ex parte Milligan,* 4 Wall. 2; *Sterling* v. *Constantin,* 287 U. S. 378). Fourth, as Chief Justice Hughes said in *Home Bldg. & Loan Assn.* v. *Blaisdell,* 290 U. S. 398, 426:

> "But even the war power does not remove constitutional limitations safeguarding essential liberties."

What, then, is the authority for these orders which discriminate against a group of citizens because of their race, which remove them from their homes and detain them against their will and which set up no hearings machinery whatever? Clearly they derive no legal sanction from the Alien Enemy Act (50 U. S. C. A. 21) or the Articles of War (10 U. S. C. A. 1471ff). They purport to rest on Executive Order 9066 and to be justified by the Act of March 21, 1942. It will be noted, however, that neither the order of the President nor the Act of Congress authorize racial discrimination or action without due process. We shall consider each of the three grounds on which we consider the orders objectionable: 1. racial discrimination: 2. detention and evacuation by military authority: 3. lack

of hearings. We shall deal in each instance with the claim of military necessity advanced in support of the orders.

1. Racial discrimination is abhorrent to our institutions.

Never has Congress attempted to differentiate between citizens on the ground of their racial or national origins. The President has promulgated a policy condemning such discrimination in defense employment (Executive Order 8802, June 22, 1941). To effectuate that policy he established a Fair Employment Practices Committee which has held hearings in various parts of the country.

This Court has condemned discrimination on racial grounds whenever the problem has come before it.[5] True, these cases rest on the equal protection clause of the Fourteenth Amendment and that clause limits only the states, not the national government. Yet the due process clause of the Fifth Amendment bars classifications lacking in reasonable basis. (See *Isbrandtsen-Moller Co.* v. *United States*, 300 U. S. 139). And racial grounds have been held to be an improper basis of classification under the due process clause of the Fourteenth Amendment. (See *Buchanan* v. *Warley*, 245 U. S. 60; *City of Richmond* v. *Deans*, 37 Fed. [2d] 712, affd. 281 U. S. 704.) Indeed, there could be little doubt that any attempt on the part of Congress to divest citizens of important rights on the basis of race would be declared unconstitutional by this Court.

But it is said that these are war measures, justified by the circumstances of the threat to the West Coast. The only relevant circumstance is that one of our enemies has nationals living in our midst, some of whom may be under suspicion. Is that to constitute a rational ground for discriminating against all native born descendents of such nationals? Even an alien Japanese residing here is entitled to sue in the courts (*Ex parte Kawato*, 317 U. S. 69). In that case Mr. Justice Black noted that this alien had pre-

[5] See *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Yu Cong Eng* v. *Trinidad*, 271 U. S. 500. Cf. *Mitchell* v. *United States*, 313 U. S. 80.

sumably come here for the same reasons which prompted millions of others to do likewise: "a chance to make his home and work in a free country, governed by just laws, which promise equal protection to all who abide by them". What shall be said of the justice and equality of this wholesale discrimination against the native born children of immigrants such as these? With equal propriety could measures be advocated which sought to remove all citizens of Italian or German descent from the entire East Coast of the country.

Whatever the measures that war might justify, the wholesale attribution of disloyalty to a racial group of citizens by mere military order cannot, under the Constitution, be one of them.

2. The military have no right to control civilians as here provided.

It must be apparent at the outset that in the situation here presented the military authorities have not taken action solely because of military considerations. This is not the case of an order to evacuate a particular section of the coast which the Army wanted to use for military operations. On the contrary, the orders, both that imposing a curfew and those compelling evacuation, were not limited to areas of strategic importance. The former covered approximately half of the states of California, Washington and Oregon, and nearly one-third of Arizona. The evacuation orders cover also the remaining half of California. (Relocation Communities for Wartime Evacuees, War Relocation Authority, Sept., 1942). Moreover, the orders included all persons of Japanese descent, whether alien or citizen, adults or children, male or female, without regard to their individual records; they included the vast majority of unquestionably loyal persons as well as those few who may have been suspected of disloyalty. Also they involved the forced sales of properties and businesses and forced confinement of persons in "evacuation" camps. As was pointed out by the Tolan Committee of the House, there are many who believe that these measures were prompted

primarily by the antagonism of the white populations in the states affected. Interests which had long been anti-Japanese saw an opportunity at one stroke to get rid of the minority and of acquiring its properties (77th Congress, 2d Session, House Report 2124, pp. 147 ff.).

That the Army has not in fact proceeded on military grounds is at once apparent from the language of Executive Order 9066. The introductory clause refers not to the conduct of military operations, but to "protection against espionage and against sabotage". These are matters which concern the Department of Justice, not the War Department. Congress has passed laws designed to punish espionage and sabotage. Under our form of government persons charged with the violation of such laws are entitled to all the safeguards which the Bill of Rights affords to the individual—to freedom from the unreasonable seizure of his person, to trial only after indictment and before a jury, to the right to counsel and confrontation of witnesses. The Constitution forbids that any agency of government deprive a person (not an enemy alien) of his liberty merely on suspicion that he has violated a law. See *Stoutenburgh* v. *Frazier*, 16 App. Cases (D. C.) 229). How much more must it be a violation of these constitutional provisions to deprive a whole class of citizens of their liberty! It is evident that in so far as the President attempted to vest the military authorities with power to deal with persons suspected of violating the laws against espionage and sabotage he was going beyond his constitutional power.

The constitutional limitations on the power of the military to deal with offenses such as sabotage were but recently laid down by this Court in *Ex parte Quirin*, 317 U. S. 1. The opinion of the Chief Justice makes it perfectly clear that the military authorities do not acquire jurisdiction merely because the offense is that of sabotage. Necessarily that must be so, as otherwise there would be no limit whatever to military power during war time. For during a war every interference with production or morale aids the enemy. Yet not every violator of the Espionage Act and the other war time statutes can be punished by military

authority. It is clear that not the nature of the offense alone, but the identity of the individual as well, determines whether civil or military authority shall have jurisdiction. Thus the *Quirin* case allows the military to assume control only over individuals who are part of the armed forces of the enemy; ordinary civilians resident in this country remain subject to the ordinary criminal law. That was ruled in the *Milligan* case, *supra*. And this basic constitutional principle cannot be deprived of force by any contention that modern war is different. Such are always the arguments of those who seek unlimited power. Besides, the notion that sabotage and espionage are attributes especially of modern warfare is without historical support. In all times spies and wreckers have performed important functions, even "fifth columnists" are of ancient origin, though the name by which they went varied.[c]

Moreover, even in those situations in which military jurisdiction might attach, it does so for the purpose of trying the suspected individual. Not even the military may detain a citizen indefinitely without a hearing—at least not so long as the writ of habeas corpus remains unsuspended. See *Ex parte Merryman*, 17 Fed. Cases 144. Chief Justice Taney there pointed out that, since the civil courts were open and there was no danger of obstruction to action of the civil authorities, there was no justification for taking petitioner into custody by military authority.

As Justice Swayne said in *Raymond* v. *Thomas*, 91 U. S. 712, 716: "It is an unbending rule of law, that the exercise of military power, where the rights of citizens are concerned, shall never be pushed beyond what the exigency requires". And that the courts will determine when the exigency does justify military action, even in war time, was made plain in *Mitchell* v. *Harmony*, 13 How. 115. In that case the owner of property sued an army officer claiming that his property had been taken by the army during one of the campaigns in the War with Mexico. The officer sought

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[c] Cf. the "Trojan horse"; in our Civil War they were called "Copperheads".

to justify his acts, claiming that military necessity required that the property be seized lest it fall into the hands of the enemy. The Trial Court received evidence of the circumstances which indicated that the seizure was motivated by different considerations, namely, a desire to use the property on a projected attack. He charged the jury that the claim of military necessity could be sustained only if the danger was "immediate and impending and not remote or contingent". The jury, having found for the plaintiff, this charge was upheld. This Court made it perfectly plain that whenever military necessity is asserted as justification for an interference with the rights of a citizen the courts must determine whether the claimed necessity really existed. While, of course, the military authorities are not required to act at their peril, so that they will not be penalized merely because the event showed the necessity not to have existed, it is also not enough that they acted in good faith believing there was such necessity. There must be reasonable grounds for a belief that the necessity did exist.

Let us measure the actions of General DeWitt by these standards. Clearly there can be no claim that the 70,000 citizens ordered evacuated were enemy agents or part of the armed forces of the enemy. Nor is there any basis for a claim that appellant was so situated. Therefore, under the *Quirin* and *Milligan* cases the military had no jurisdiction to try these citizens. And if it had no jurisdiction to try them, it had even less to detain them. But it is said that "danger of invasion" required the removal of these citizens. While it is significant that Public Proclamation No. 1 refers to the possibility of invasion, the action foreshadowed in this document has to do not with any of the military aspects of invasion, but with the considerations which the President had referred to as the sole reason for his Executive Order, namely, the danger of sabotage and espionage. No claim of military necessity can make these matters the subject of military jurisdiction over ordinary citizens.

Judge Black, when he overruled the demurrer in the instant case (46 F. Supp. 657), sought to justify the orders

by reference to parachutists and infiltration tactics. It is difficult to follow the argument. Whatever may have been the panicky notion about a Japanese invasion of the West Coast right after Pearl Harbor, it was quite evident by the time the orders here in question were promulgated that the Japanese were not easily going to be able to do this. They had not invaded Australia; had not even attacked Hawaii a second time.[7] The picture of Japanese paratroops hiding among the Japanese residents of the West Coast to assist at an invasion is pure fantasy. The truth of the matter is that there was no military necessity, nor even reasonable ground for belief that such necessity required either general curfew regulations or wholesale evacuation orders. The experience in Hawaii demonstrates this beyond a shadow of a doubt.

We believe that the true view of these military orders was that laid down by Judge Fee in *United States* v. *Yasui*, 45 F. Supp. 40; now also before this Court on certification from the Ninth Circuit. No other view would be consistent with our constitutional form of government in which the civil power, not the military, is supreme.

If it be argued that war creates special problems the answer must always be that they must be solved under the Constitution. However great the emergency, its provisions control. At least such must be the answer in this Court. As the Chief Justice said in the *Quirin* case, a duty rests on the courts, "in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty". Nor are any insuperable difficulties presented by such an answer. For the framers of the Constitution, who had themselves just been through a great war, recognized that circumstances might arise in which the ordinary safeguards of the law might, temporarily at least, be suspended. In time of invasion or rebellion the Constitution authorizes the suspension of the writ of habeas corpus. The power of the Executive to order the detention

[7] In March fighting was still going on in the Philippines—Bataan surrendered on April 9, Corregidor on May 6. And there was no attempt to attack Midway until the first week in June.

of persons on suspicion without possibility of judicial review thus exists. But it must be confined to the circumstances described in the Constitution and be exercised in the manner there provided. The only permissible exception is under martial law, a state of suspended civil power not expressly recognized in the Constitution but evidently deemed implicit in military power. But absent martial law, lacking the suspension of the writ of habeas corpus, military power does not extend to civilians. Any other rule would be destructive of the Constitution and the generator of tyranny.

3. A hearing was the minimum protection to which appellant was entitled.

Even if it be assumed that the Constitution permits discrimination based on race and the regulation of civilian life by military authority the minimum requirement of due process is that a person be given a hearing before being deprived of his liberty and compelled to abandon his home and occupation. Vast powers are today confided to various administrative agencies and executive officers. Never before has it been supposed that these powers could be exercised without any provision for a hearing at any stage of the process. Due process demands that there be some hearing "before the final order becomes effective" (*Opp Cotton Mills, Inc.* v. *Administrator,* 312 U. S. 126, 153).

Such hearings might have been held here at some stage of the process. The Government has found no difficulty in arranging for hearings for alien enemies before interning them. The Attorney General was able, within ten months of Pearl Harbor, to clear all of the 600,000 aliens of Italian origin because he had found that only 228 were disloyal (Statement of October 12, 1942; Order of October 14, 1942). He could certainly have made a similar investigation of the 70,000 American citizens of Japanese ancestry by the time the evacuation order here in question was issued. Surely citizens were entitled to the same consideration as aliens! That such hearings would have been

feasible is the considered opinion of one fully familiar with the situation. (See Harpers Magazine, October, 1942, pp. 489 ff.).

We submit, therefore, that no procedure, whether military or civil, can be sustained which makes no provision for hearings in order to determine whether the individuals affected come within the reason for the general action. (See *Buck* v. *Bell*, 274 U. S. 200; *Skinner* v. *Oklahoma*, 316 U. S. 535.)

CONCLUSION

It is respectfully submitted that the conviction appealed from should be reversed and the indictment dismissed, either on the ground that the statute under which the prosecution was instituted is unconstitutional, or on the ground that the military orders which appellant disobeyed were unconstitutional or unauthorized by law. Often the question has been raised whether this country could wage a new war without loss of its fundamental liberties at home. Here is one occasion for this Court to give an unequivocal answer to that question and show the world that we can fight for democracy and preserve it too. And in no field is a clear decision so important as in that involving the relations between the races.

Respectfully submitted,

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APPENDIX

Executive Order of the President No. 9066

February 19, 1942

Whereas the successful prosecution of the war requires every possible protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities as defined in Section 4, Act of April 20, 1918, 40 Stat. 533, as amended by the Act of November 30, 1940, 54 Stat. 1220, and the Act of August 21, 1941, 55 Stat. 655 (U. S. C., Title 50, Sec. 104):

Now, therefore, by virtue of the authority vested in me as President of the United States, and Commander in Chief of the Army and Navy, I hereby authorize and direct the Secretary of War, and the Military Commanders who he may from time to time designate, whenever he or any designated Commander deems such action necessary or desirable, to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion. The Secretary of War is hereby authorized to provide for residents of any such area who are excluded therefrom such transportation, food, shelter, and other accommodations as may be necessary, in the judgment of the Secretary of War or the said Military Commander, and until other arrangements are made, to accomplish the purpose of this order. The designation of military areas in any region or locality shall supersede designations of prohibited and restricted areas by the Attorney General

under the Proclamations of December 7 and 8, 1941, and shall supersede the responsibility and authority of the Attorney General under the said Proclamations in respect of such prohibited and restricted areas.

I hereby further authorize and direct the Secretary of War and the said Military Commanders to take such other steps as he or the appropriate Military Commander may deem advisable to enforce compliance with the restrictions applicable to each Military area hereinabove authorized to be designated, including the use of Federal troops and other Federal Agencies, with authority to accept assistance of state and local agencies.

I hereby further authorize and direct all Executive Departments, independent establishments and other Federal Agencies, to assist the Secretary of War or the said Military Commanders in carrying out this Executive Order, including the furnishing of medical aid, hospitalization, food, clothing, transportation, use of land, shelter, and other supplies, equipment, utilities, facilities, and services.

This order shall not be construed as modifying or limiting in any way the authority heretofore granted under Executive Order No. 8972, dated December 12, 1941, nor shall it be construed as limiting or modifying the duty and responsibility of the Federal Bureau of Investigation, with respect to the investigation of alleged acts of sabotage or the duty and responsibility of the Attorney General and the Department of Justice under the Proclamations of December 7 and 8, 1941, prescribing regulations for the conduct and control of alien enemies, except as such duty and responsibility is superseded by the designation of military areas hereunder.

Public Proclamation No. 1

March 2, 1942

To: The people within the States of Arizona, California, Oregon, and Washington, and the Public Generally:

WHEREAS, By virtue of orders issued by the War Department on December 11, 1941, that portion of the United States lying within the States of Washington, Oregon, California, Montana, Idaho, Nevada, Utah, and Arizona and the Territory of Alaska has been established as the Western Defense Command and designated as a Theatre of Operations under my command and;

WHEREAS, By Executive Order No. 9066, dated February 19, 1942, the President of the United States authorized and directed the Secretary of War and the Military Commanders whom he may from time to time designate, whenever he or any such designated commander deems such action necessary or desirable, to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded, and with respect to which the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion; and

WHEREAS, The Secretary of War on February 20, 1942, designated the undersigned as the Military Commander to carry out the duties and responsibilities imposed by said Executive Order for that portion of the United States embraced in the Western Defense Command; and

WHEREAS, The Western Defense Command embraces the entire Pacific Coast of the United States which by its geographical location is particularly subject to attack, to attempted invasion by the armed forces of nations with which the United States is now at war, and, in connection

therewith, is subject to espionage and acts of sabotage, thereby requiring the adoption of military measures necessary to establish safeguards against such enemy operations:

Now THEREFORE, I, J. L. DeWitt, Lieutenant General, U. S. Army, by virtue of the authority vested in me by the President of the United States and by the Secretary of War and my powers and prerogatives as Commanding General of the Western Defense Command, do hereby declare that:

1. The present situation requires as a matter of military necessity the establishment in the territory embraced by the Western Defense Command of Military Areas and Zones thereof as defined in Exhibit 1, hereto attached, and as generally shown on the map attached hereto and marked Exhibit 2.

2. Military Areas Nos. 1 and 2, as particularly described and generally shown hereinafter and in Exhibits 1 and 2 hereto, are hereby designated and established.

3. Within Military Areas Nos. 1 and 2 there are established Zone A-1, lying wholly within Military Area No. 1; Zones A-2 to A-99, inclusive, some of which are in Military Area No. 1, and the others in Military Area No. 2; and Zone B, comprising all that part of Military Area No. 1 not included within Zones A-1 to A-99, inclusive; all as more particularly described and defined and generally shown hereinafter and in Exhibits 1 and 2.

Military Area No. 2 comprises all that part of the States of Washington, Oregon, California and Arizona which is not included within Military Area No. 1, and is shown on the map (Exhibit 2) as an unshaded area.

4. Such persons or classes of persons as the situation may require will by subsequent proclamation be excluded from all of Military Area No. 1 and also from such of those zones herein described as Zones A-2 to A-99, inclusive, as are within Military Area No. 2.

Public Proclamation No. 3

March 24, 1942

To the people within the States of Washington, Oregon, California, Montana, Idaho, Nevada, Utah and Arizona, and the Public Generally:

WHEREAS, By Public Proclamation No. 1, dated March 2, 1942, this headquarters, there were designated and established Military Areas Nos. 1 and 2 and Zones thereof, and

WHEREAS, By Public Proclamation No. 2, dated March 16, 1942, this headquarters, there were designated and established Military Areas Nos. 3, 4, 5, and 6 and Zones thereof, and

WHEREAS, The present situation within these Military Areas and Zones requires as a matter of military necessity the establishment of certain regulations pertaining to all enemy aliens and all persons of Japanese ancestry within said Military Areas and Zones thereof:

NOW, THEREFORE I, J. L. DE WITT, Lieutenant General, U. S. Army, by virtue of the authority vested in me by the President of the United States and by the Secretary of War and my powers and prerogatives as Commanding General, Western Defense Command, do hereby declare and establish the following regulations covering the conduct to be observed by all alien Japanese, all alien Germans, all alien Italians, and all persons of Japanese ancestry residing or being within the Military Areas above described, or such portions thereof as are hereinafter mentioned:

1. From and after 6:00 A. M., March 27, 1942, all alien Japanese, all alien Germans, all alien Italians, and all persons of Japanese ancestry residing or being within the geographical limits of Military Area No. 1, or within any of the Zones established within Military Area No. 2, as

those areas are defined and described in Public Proclamation No. 1, dated March 2, 1942, this headquarters, or within the geographical limits of the designated Zones established within Military Areas Nos. 3, 4, 5, and 6, as those areas are defined and described in Public Proclamation No. 2 dated March 16, 1942, this headquarters, or within any of such additional Zones as may hereafter be similarly designated and defined, shall be within their place of residence between the hours of 8:00 P. M. and 6:00 A. M., which period is hereinafter referred to as the hours of curfew.

2. At all other times all such persons shall be only at their place of residence or employment or traveling between those places or within a distance of not more than five miles from their place of residence.

3. Nothing in paragraph 2 shall be construed to prohibit any of the above specified persons from visiting the nearest United States Post Office, United States Employment Service Office, or office operated or maintained by the Wartime Civil Control Administration, for the purpose of transacting any business or the making of any arrangements reasonably necessary to accomplish evacuation; nor be construed to prohibit travel under duly issued change of residence notice and travel permit provided for in paragraph 5 of Public Proclamation Numbers 1 and 2. Travel performed in change of residence to a place outside the prohibited and restricted areas may be performed without regard to curfew hours.

4. Any person violating these regulations will be subject to immediate exclusion from the Military Areas and Zones specified in paragraph 1 and to the criminal penalties provided by Public Law No. 503, 77th Congress, approved March 21, 1942, entitled: "An Act to Provide a Penalty for Violation of Restrictions or Orders With Respect to Persons Entering, Remaining in, Leaving or Committing Any Act in Military Areas or Zone." In the case of any alien enemy, such person will in addition be subject to immediate apprehension and internment. • • •

Public Proclamation No. 7

June 8, 1942

To: *The People within the States of Washington, Oregon, California and Arizona, and the Public Generally:*

WHEREAS, by Public Proclamation No. 1, dated March 2, 1942, this headquarters, there was designated and established Military Area No. 1; and

WHEREAS, by Civilian Exclusion Orders Nos. 1 to 99 inclusive, this headquarters, all persons of Japanese ancestry, both alien and non-alien, were excluded from portions of Military Area No. 1; and

WHEREAS, the present situation requires as a matter of military necessity that all citizens of Japan and all persons of Japanese ancestry, both alien and non-alien be excluded from all of Military Area No. 1:

NOW, THEREFORE, I, J. L. DEWITT, Lieutenant General, U. S. Army, by virtue of the authority vested in me by the President of the United States and by the Secretary of War and my powers and prerogatives as Commanding General, Western Defense Command, do hereby declare that:

1. Civilian Exclusion Orders Nos. 1 to 99 inclusive, this headquarters, together with all exclusions and evacuations accomplished thereunder, are hereby ratified and confirmed.

2. All citizens of Japan and all persons of Japanese ancestry, both alien and non-alien, except as provided in paragraph 3 hereof, are hereby excluded from all portions of Military Area No. 1.

3. The following persons are hereby temporarily exempted or deferred from exclusion and evacuation:

(a) Those individuals who are within the bounds of an established Wartime Civil Control Administration Assembly Center or the area of a War Relocation Authority Project, while such individuals are therein pursuant to orders or instructions of this headquarters.

(b) Those individuals who are involuntarily interned or confined in Federal, State, or local institutions and who are in the custody of Federal, State or local authorities, while such individuals are so interned or confined.

(c) Those individuals who, by written permits of this headquarters, have been heretofore or are hereafter expressly authorized to be temporarily exempted or deferred from exclusion and evacuation, subject to the terms and conditions of such permits.

4. All citizens of Japan and all persons of Japanese ancestry, both alien and non-alien, who are now in Military Area No. 1 and who are not excluded from all portions of said Area by Paragraph 2 hereof, and who are not temporarily exempted or deferred from exclusion and evacuation under Paragraph 3 hereof, shall, and they are hereby required to report in person to the nearest established Wartime Civil Control Administration Assembly Center, or, in the alternative, to the nearest Federal, State, County, or local law enforcement agency, within 8 hours from 12:00 o'clock, noon, P.W.T., June 8, 1942. Failure to so report will constitute a violation of this Proclamation.

5. Any person violating this Proclamation will be subject to the criminal penalties provided by Public Law No. 503, 77th Congress, approved March 21, 1942, entitled: "An Act to Provide a Penalty for Violation of Restrictions

or Orders with Respect to Persons Entering, Remaining in, Leaving or Committing any Act in Military Areas or Zones," and any alien Japanese will be subject to immediate apprehension and internment.

J. L. DeWitt
Lieutenant General, U. S. Army
Commanding

Civilian Exclusion Order No. 57

May 10, 1942

1. Pursuant to the provisions of Public Proclamations Nos. 1 and 2, this Headquarters, dated March 2, 1942, and March 16, 1942, respectively, it is hereby ordered that from and after 12 o'clock noon, P.W.T., of Saturday, May 16, 1942, all persons of Japanese ancestry, both alien and non-alien, be excluded from that portion of Military Area No. 1 described as follows:

> All that portion of the County of King, State of Washington, within the boundary beginning at the intersection of Roosevelt Way and East Eighty-fifth Street; thence easterly along East Eighty-fifth Street and East Eighty-fifth Street extended to Lake Washington; thence southerly along the shoreline of Lake Washington the point at which Yesler Way meets Lake Washington; thence westerly along Yesler Way to Fifteenth Avenue; thence northerly on Fifteenth Avenue to East Madison Street; thence southwesterly on East Madison Street to Fifth Avenue; thence northwesterly along Fifth Avenue to Westlake Avenue; thence northerly along Westlake Avenue to Virginia Street; thence northeasterly along Virginia Street to Fairview Avenue North; thence northerly along Fairview Avenue North to Eastlake Avenue; thence north-

erly along Eastlake Avenue to Roosevelt Way; thence northerly along Roosevelt Way to the point of beginning.

2. A responsible member of each family, and each individual living alone, in the above described area will report between the hours of 8:00 A.M. and 5:00 P.M., Monday, May 11, 1942, or during the same hours on Tuesday, May 12, 1942, to the Civil Control Station located at:

Christian Youth Center,
2203 East Madison Street,
Seattle, Washington.

3. Any person subject to this order who fails to comply with any of its provisions or with the provisions of published instructions pertaining hereto or who is found in the above area after 12 o'clock noon, P.W.T., of Saturday, May 16, 1942, will be liable to the criminal penalties provided by Public Law No. 503, 77th Congress, approved March 21, 1942, entitled "An Act to Provide a Penalty for Violation of Restrictions or Orders with Respect to Persons Entering, Remaining in, Leaving or Committing any Act in Military Areas or Zones," and alien Japanese will be subject to immediate apprehension and internment.

4. All persons within the bounds of an established Assembly Center pursuant to instructions from this Headquarters are excepted from the provisions of this order while those persons are in such Assembly Center.

J. L. DeWitt
Lieutenant General, U. S. Army
Commanding

Certificate of United States Circuit Court of Appeals for the Ninth Circuit

Upon Appeal From The District Court Of The United States For The Western District Of Washington Northern Division

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Certificate to the Supreme Court of the United States of questions of law upon which the Circuit Court of Appeals for the Ninth circuit desires instruction for the proper decision of a cause.

To the Honorable the Chief Justice and the Justices of the Supreme Court of the United States:

STATEMENT OF CASE

This cause is pending before the United States Circuit Court of Appeals for the Ninth Circuit after argument on appeal from a judgment of conviction upon a jury verdict of guilty on each of two counts of an indictment returned in the District Court for the Western District of Washington, Northern Division. The first count of the indictment charges the appellant, Gordon Hirabayashi, is a native-born citizen of the United States of Japanese ancestry residing in Seattle, Kings County, Washington, within Military Area No. 1 established by Public Proclamation No. 1 of March 2, 1942 of Lt. Gen. John L. DeWitt, Commanding General of the Western Defense Command and Fourth Army, pursuant to Executive Order 9066 of the President of the United States dated February 19, 1942; that Lt. Gen. DeWitt's Civilian Exclusion Order No. 57 of May 10, 1942, pursuant to the provisions of the said Public Proclamation No. 1, ordered that from and after 12 o'clock noon May 16, 1942, all persons of Japanese ancestry be excluded from a particular described portion of the said Military Area No. 1 in Seattle, Washington, including the place of residence of the said appellant, required a re-

sponsible member of each family and each individual living alone, affected by the Civilian Exclusion Order to report on May 11 or 12, 1942 to the designated Civil Control Station in Seattle, Washington, and provided that any person who failed to comply would be subject to the criminal penalties of the Act of March 21, 1942; and that the appellant wilfully and knowingly failed and refused to report to the said Civil Control Station as ordered by the said Civilian Exclusion Order in violation of the said Act of March 21, 1942 which provides that whoever enters and remains in, leaves, or commits any act in any military area prescribed by a military commander designated by the Secretary of War under authority of an Executive Order of the President contrary to the restrictions applicable to any such area or the order of any such military commander, shall be guilty of a misdemeanor punishable by a fine not to exceed $5,000 or imprisonment of not more than one year or both if it appears that he knew or should have known of the existence and extent of the restrictions or order and that his act was a violation. Executive Order 9066 authorizes the Secretary of War and the military commanders designated by him to prescribe military areas in such places and of such extent as he or the appropriate military commander may determine from which any or all persons may be excluded and with respect to which the right of any person to enter, remain in or leave shall be subject to whatever restrictions the Secretary of War or the appropriate military commander may impose in his discretion.

The second count of the indictment charged that Lt. Gen. DeWitt's Public Proclamation No. 3 of March 24, 1942, pursuant to the authority of Executive Order 9066, required all alien Japanese, Germans and Italians and all persons of Japanese ancestry, including the appellant, residing or being within the geographical limits of Military Area No. 1, established by Lt. Gen. DeWitt's Public Proclamation No. 1 of March 2, 1942, after 6:00 a.m. March 27, 1942, to be within their places of residence daily between the curfew hours of 8:00 p.m. and 6:00 a.m.; and that the

appellant on the evening of March ____, 1942, knowingly and wilfully was not within his place of residence and was elsewhere after the curfew hour of 8:00 p.m. in violation of said Act of March 21, 1942.

In the District Court, and in his timely appeal from the judgment and sentence of conviction entered on October 21, 1942, based on appropriate and timely motions, objections and exceptions, the appellant did not deny that he is an American citizen of Japanese ancestry residing in the said military area and that he refused and failed to comply with the requirements of Civilian Exclusion Order No. 57 and the curfew requirement. He contends that the military control over American citizens here exercised is forbidden by the United States Constitution as interpreted in *Ex parte Milligan*, 4 Wall. 2 and other authorities. He also contends that neither the Congress nor the President has the power to command him, an American citizen not charged with any crime or disloyalty and solely on the basis of his Japanese ancestry, to report to a Civil Control Station in connection with the exclusion program and to remain in his place of residence during the curfew hours not applicable to other American citizens not of Japanese ancestry and that to do so deprives him of due process and equal protection of law. The appellant also contends, and the Government denies, that the Act of March 21, 1942 is an unconstitutional delegation to the military authorities of the power of Congress to define criminal conduct. The Government contends that the application of the military curfew and exclusion to all persons of Japanese ancestry is a valid exercise of the war powers of the President derived from the Constitution and the statutes of the United States. The Government also contends that the exclusion of all persons of Japanese ancestry was reasonable and constitutional in the military emergency which faced the military authorities on the West Coast at the beginning of the current war between the United States and the Empire of Japan.

This cause thus raises novel constitutional questions of great public importance pertaining to an exercise of the war powers to enforce two important regulations which form an important part of the wartime evacuation of the Pacific Coast Japanese population. This court is familiar with the decisions of the Supreme Court of the United States upholding broad exercises of the war powers of the Federal Government. On the one hand, however, this Court knows of no decision in which citizens residing in areas not subject to martial law have been required by military authorities to observe a curfew and to report to military control stations for exclusion from a military area designated by the military authorities. On the other hand, this Court is sensible of the fact that the military authorities held the view that military exigencies of modern warfare imperiling the nation and existing on the Pacific Coast at the beginning of the present war were far more grave than any situation hitherto existing in any war with a foreign nation. No doubt because of the military authorities' view of the extreme peril facing the nation this exercise of the war powers of the Federal Government was employed. The question whether this exercise of the war power can be reconciled with traditional standards of personal liberty and freedom guaranteed by the Constitution, is most difficult. This Court, therefore, pursuant to Judicial Code, Section 239, amended (28 U.S.C. Sec. 346), certifies to the Supreme Court of the United States the following questions of law concerning which instructions are desired for the proper decision of the cause:

QUESTIONS CERTIFIED

1. Was Lt. Gen. DeWitt's Civilian Exclusion Order No. 57 of May 10, 1942 excluding all persons of Japanese ancestry, including American citizens of Japanese ancestry, from and after 12 o'clock noon, May 16, 1942, from a particular area in Seattle, Washington within Military Area

No. 1 established by General DeWitt's Proclamation No. 1 of March 2, 1942 and requiring a responsible member of each family, and each individual living alone, affected by the order to report on May 11 or 12, 1942 to the Civil Control Station in the said area in connection with said exclusion, a constitutional exercise of the war powers of the President derived from the Constitution and statutes of the United States.

2. Was Lt. Gen. DeWitt's Public Proclamation No. 3 of March 24, 1942 requiring all alien Japanese, Germans and Italians and all persons of Japanese ancestry, including American citizens of Japanese ancestry, residing or being within the geographical limits of Military Area No. 1 established by Public Proclamation No. 1 of March 2, 1942 to be within their place of residence between the curfew hours of 8:00 p.m. and 6:00 a.m. daily, a constitutional exercise of the said war powers.

3. If the answer to question One or the answer to question Two is in the affirmative, did the Act of March 21, 1942 (18 U.S.C. 97A) constitutionally make it a criminal offense for the appellant wilfully and knowingly to fail to report to the Civil Control Station as ordered or to remain outside of his place of residence during the curfew hours.

Filed March 27, 1943,

CURTIS D. WILBUR,
Circuit Judge.

FRANCIS A. GARRECHT,
Circuit Judge.

BERT EMORY HANEY,
Circuit Judge.

CLIFTON MATHEWS,
Circuit Judge.

WILLIAM HEALY,
Circuit Judge.

DENMAN, Circuit Judge, Dissenting:

I dissent from the certification on the grounds,

(1) Because the questions simply transfer to the Supreme Court the final decision of the matters pending here, namely, as to the guilt or innocence of the appellant referred to.

(2) Because, assuming the questions are proper for certification, they take from this court, with its peculiarly clearly defined judicial cognizance of facts of the relationship of Japanese descended citizens to the white citizens in the social fabric of the Pacific coastal areas involved, the valuable contribution which such a court of appeals as this may give to the consideration of issues of such major importance. If the case were to be certified, the facts should have been stated in the certificate.

(3) Because certain important admissions were made by both the Government and the appellant at the hearing before this court, pertinent to the final decisions of the case involved in the questions, of which the certificate makes no mention.

(4) Because, although the certificate asks the questions, in effect, a final decision of the guilt or innocence of the appellant, the certificate purports to state but one of the many contentions made by appellant concerning the invalidity of the orders of General DeWitt, matters upon which we ask no advice, though they must be determined by the Supreme Court in its answers to the questions.

(5) I dissent from the war-haste with which the question involving the deportation of 70,000 of our citizens, without hearing, is hurried out of this court, with its peculiar qualifications for the consideration of the racial questions involved, on the plea of the Attorney General, one of the litigants, which, as I understand it, is that it will

discommode the Supreme Court to reassemble to consider the case in the time in which it would mature for hearing before that Court upon petition for certiorari. In this connection, I note that the Supreme Court did reconvene in its vacation period in a case of lesser importance. Ex parte Richard Quiren, argued on July 29 and July 30, 1942.

This dissent will be more fully stated in an opinion which is now in preparation and should be before the court by airmail by Tuesday morning next.

WILLIAM DENMAN,
Circuit Judge.

(Endorsed) Certificate to the Supreme Court of the United States of questions of law upon which the Circuit Court of Appeals for the Ninth Circuit desires instruction for the proper decision of a cause, and dissent of Denman, C.J.

Filed March 27, 1943,

PAUL P. O'BRIEN,
Clerk.

Dissenting Opinion in the United States Circuit Court of Appeals for the Ninth Circuit

Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division

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Opinion of Denman, Circuit Judge, on his dissent from the certification of questions to the Supreme Court, and from the omission of facts therefrom.

DENMAN, Circuit Judge, dissenting:

Certain of my associates are of the opinion that it is not within the power of a participating member of the court to dissent from the decision of the court that it certify questions to the Supreme Court under section 239 of the Judicial Code (28 U. S. C. A. 346) or from the content of the certificate. With this contention I do not agree.

Certification is a judicial action vitally affecting the litigants, since it transfers from one tribunal to another the forum of adjudication of the questions certified. The primary issue argued here is one of classification of Japanese descended citizens from other citizens descended from aliens of countries with which we are at war. The validity of such a classification is entirely a question of fact largely in the ill-defined area of judicial notice. The Supreme Court in civil cases takes judicial notice of the laws of the several states, yet believes justice is better served if such questions are left to the respective circuit courts of appeals. If this be true of civil cases, it is true *a fortiori* of such criminal cases as those involving psychological facts which, in my opinion, alone could warrant the discriminating cruelty with which these Mongoloid people have been treated.

Entirely apart from the question of costs of a second presentation to a distant tribunal, these unfortunate per-

sons (if the certificate is granted) will have the decision of these questions of fact removed from the circuit court of appeals which is best qualified to find them. I dissent from a certification which seeks to avoid the exercise of our special knowledge of the psychology of these deported citizens.

If it be unusual for a judge of a court in which he is a participant to dissent from his associates on the matter of a certification, the occasion is even more unusual.

Under the threat of penitentiary sentences to these 70,000 American citizens who have relied on the right they believe the Constitution gives them, we are driving from their homes to internment camps, not men alone, as with the deportation of the Dutch by the Germans, but their wives and children, without giving the latter the choice to remain in their homes. We are destroying their businesses, in effect, as if such citizens were enemy aliens. The destruction of their business connections means for many that they will not be able to return to their native areas; in effect, as were the French Canadians so taken to Louisiana.

While none of the appellants had yet been interned, the deportation order was but the initial step in a single plan ending in imprisonment in barb wired enclosures under military guard. Descended from Eastern Asiatics, they have been imprisoned as the Germans imprisoned the Western Asiatic descended Jews.

The first omission of fact from the certificate, which I regard as prejudicial to the appellants, is the admission by the Government, at the hearing here, that not one of these 70,000 Japanese descended citizen deportees had filed against him in any federal court of this circuit an indictment or information charging espionage, sabotage or any treasonable act. This admission covered the five months from Pearl Harbor to General DeWitt's deportation order of May 10, 1942. I dissent from the absence of such an admission of fact from the certificate.

I also dissent from the omission from the certificate of the following facts concerning the issue of a "present danger of immediate evil [sabotage and espionage][1] or an intent to bring it about,"[2] which would warrant General DeWitt's order, in effect, of deportation of citizens without trial for their immediate imprisonment. They are facts from which pertinent inferences may be drawn regarding the psychologic impulses and impelling convictions and personal loyalties and sympathies of a yellow Mongoloid body of citizens living in a predominantly Caucasian society and subject to legal and social compulsions because of race and color.

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[1] The President's military zone and deportation order of February 19, 1942, and its enforcing provisions, are

"Whereas the successful prosecution of the war requires every possible protection against espionage and against sabotage to national defense material, national defense premises, and national defense utilities as defined in Section 4, Act of April 20, 1918, 40 Stat. 533, as amended by the Act of November 30, 1940, 54 Stat. 1220, and the Act of August 21, 1941, 55 Stat. 655 (U. S. C., Title 50, Sec. 104):

Now, therefore, by virtue of the authority vested in me as President of the United States, and Commander in Chief of the Army and Navy, I hereby authorize and direct the Secretary of War, and the Military Commanders who he may from time to time designate, whenever he or any designated Commander deems such action necessary or desirable, to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, *from which any or all persons may be excluded*, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion. * * *

I hereby further authorize and direct the Secretary of War and the said Military Commanders to take such other steps as he or the appropriate Military Commander may deem advisable to *enforce compliance* with the restrictions applicable to each Military area hereinabove authorized to be designated, *including the use of Federal troops* and other Federal Agencies, with authority to accept assistance of state and local agencies." (Emphasis supplied.)

[2] Justice Holmes in *Abrams* v. *United States*, 250 U. S. 616, 628.

In the summary of such facts is rejected the blind war antagonism expressed in the statements that all Japanese descended people are treacherous because, after the refusal of her demands, Japan began an undeclared war at Pearl Harbor. This is no more true than that all Americans in 1853 then were treacherous because, similarly, unwarned by our Government, Commodore Perry, with his fleet of American war vessels, their guns moved into their port holes, their gunners' fuses lit, ready and intending to destroy the feeble fortifications our spies had reported, sailed into the port of Yeddo (now called Tokyo) to compel Japan to open her commerce to the Yankee Clippers of the China trade,—a 90 years ago which is only yesterday to the Japanese schoolmaster and the Shinto priest.

It is a matter of common knowledge to people of detached thinking in Pacific Coast communities, formerly living among these deported citizens, that their Mongoloid features and yellow skins have among them persons of the same high spirit, intellectual integrity and consciousness of social obligation as have the surrounding Caucasians. What is also pertinent is the fact that they have the same contempt for any hypocrisy in their treatment by their white neighbors, and the same bitter resentment of a claim of their social inferiority as Americans have of the Nazi claim of Nordic racial supremacy. It is in the normal reactions of human beings to such treatment that are found factors in the problem of the validity of General DeWitt's orders.

Another admission of fact made at the hearing and not appearing in the record or in the certificate, is the presence among these citizens of a group of young men educated in Japan and returned to the United States to live in the Japanese communities. These men were admitted to be dangerously sympathetic with Japan in the present war.

What is peculiarly within our knowledge is that in our Pacific Coast schools, in their infancy and early childhood, the Japanese and Chinese children mix freely with their white companions. They are taught to revere the flag

with the freedoms it connotes. When they reach adolescence, with its mating instincts and its inevitable affections, which often know no boundaries set by complexion or cheekbones or slant of the eyes, freedom is denied them in the most powerful of human instincts by the laws against intermarriage with the Caucasians.[2a] The strongest paternal discipline is exercised over the white children. They are told it is a degradation to mate with an Oriental; and the yellow skinned youth are made to feel a racial inferiority and in social contempt. Such facts are pertinent in determining whether General DeWitt is entitled to find, among a people suffering an humiliation so inconsistent with the equality of the flag teachings, that there will be those who will hesitate or fail to perform a citizen's duty in aiding his soldiers against the saboteur or spy.

The second most powerful indicia in the war zone commanded by General DeWitt of separateness and implied racial inferiority of the Mongoloid people, are the laws prohibiting them from owning agricultural land.[3] Many of the Japanese who immigrated here were farmers. Yet under these laws no child of Japanese parentage can be born on his alien father's farm. State decisions [4] show the evasions and deceits employed to satisfy that farmer's historic land hunger, which led to our own early westward migrations of the last century. Whether or not it is still a proper concept that the farmers constitute the "backbone of the nation," these 70,000 citizens know that those in farming communities are separated from their white companions by a fundamental social distinction, sometimes the more bitter in its expression by their European descended neighbors because of the superiority often shown by the

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[2a] California Civil Code § 60; 2 Idaho Gen. Laws Ann. § 31-206; Montana Civil Code § 5702; Arizona Code Ann. (1939) § 63-107.

[3] 1913 Cal. Stat. 260. 1 Deering Gen. Laws, Act 261; 5 Oregon Comp Laws Ann. § 61-102; Washington, Rem. Rev. Stat. § 10582.

[4] *People* v. *Osaki* (1930) 286 Pac. 1025; *People* v. *Entriken* (1930) 288 Pac. 788; *Takeuchi* v. *Schmuck* (1929) 276 Pac. 345; *People* v. *Nakamura* (1932) 13 P. (2d) 805.

Japanese in both energy and agricultural skill. These facts are entitled to be considered with reference to the likelihood of disaffection among a class so treated, in determining General DeWitt's regulations for exclusion of dangerous people from the war areas bordering the Pacific.

A third distinction, the subject of long and repeated protest from Mongoloid China and Japan, is in the Congressional laws for the exclusion of their nationals from the immigration quotas of the Europeans, the Semitic and part Semitic Western Asiatics, and the Russians of part Mongoloid blood. Neither General DeWitt nor this court is concerned with the political or social justification of this stigma on the Mongolian, but both are concerned with its effect on proud spirited people so branded by the Congress. This court, however, is in a better position than any other to know the effect of such facts on the minds of some of the now deported citizens.

A fourth discrimination of race and color is the exclusion of these citizens from any labor unions. Nothing but the stress of war gives the special permits which allow the Chinese to work in some of our war industries. Despite the outstanding mechanical skill of the Mongolian people, the freedom to make a skilled living is denied to the youth taught in our schools to point their hands at the flag which, they are told, promises them the dignity of equality of opportunity among his fellows.

One is not here concerned with the vigorous dispute as to the wisdom of such laws, a dispute having on the one hand examples of persons of the United States and Latin America distinguished in statecraft, the sciences and the arts, who are of Eurasian blood, both immediate of Chinese and Japanese origin, and more remotely through the American Indian, and on the other the frustrated rejects from the societies of each blood.

Such questions are for the peace table. The case is solely concerned with the question whether such laws and social and industrial regulations have created a real and present danger on the eastern littoral of the Pacific, in a war which

the Japanese military caste is waging after, with the aid of assassination, it destroyed an evolving Japanese democracy, having ideals in common with our own.

As a result of these and other discriminations of race and color, the Japanese of our Pacific Coast cities and towns live in segregated quarters. Though compelled to reside there by social rather than governmental force, there are many similarities with the ghettos of Europe,—among them the denial of intermarriage, of land owning, and participating in many of the livelihoods of manual skill.

Because of such limitation of social intercourse, people do not become familiar with the Mongolian physiognomy. The uniform yellow skin and, on first impression, a uniformity of facial structure, makes "all Chinks and Japs look alike to me," a common colloquialism. Hence arises a difficulty for General DeWitt's soldiers or the federal civil officers in picking out from the other Japanese crowded together in the segregated districts, and including men educated in Japan, the suspected saboteurs or spies or fugitives from a commando landing or hiding parachutists. Also the difficulty of identification of Japanese of known or suspected enemy aid, by descriptions telegraphed or written to white enforcement officers.

So far as concerns the imminence of danger of Japanese attack on the Pacific Coast, this court would be compelled to find that General DeWitt has a rational ground to expect it. It is a fact of general knowledge that in every Japanese air attack on cities and military establishments,—among them Chungking, Singapore, Midway, Rangoon, Dutch Harbor, and the British naval station in Ceylon,—enough planes passed through the defenses of warned and expectant commanders to cause a conflagration sufficient to destroy the wooden cities of our Pacific Coast.

What is commonly known on the Pacific Coast and not elsewhere, is the fact that, unlike London with hundreds of simultaneous fires in its brick and stone structures and yet no great moving front of conflagration, in wooden-built San Francisco there was a conflagration front of a mile

length within five hours of the earthquake of 1906. It was a coalescence of but seven fires. There, luckily, the earthquake placed it on the lee-side of the city, but one started by the Japanese on its windward side, in its long maintained northwest trade wind, well could have the bulk of the city in flames in ten hours. The earthquake left the exterior of the city's frame buildings intact, save for some distortions which did not increase the conflagration hazard, but the present developed technique of shattering to pieces several acres of buildings with a single bomb, makes the debris of wooden material mere fuel piles for the succeeding inflammable projectiles. A similar conflagration danger exists in all the Pacific Coast cities. In all of them, General DeWitt well could fear the added menace of the saboteur's torches.

Since the questions certified, in effect, transfer the entire case to the Supreme Court, it is unjust to the appellant to omit from the summary of the contentions on which he relied, his claim of violations of Constitutional provisions other than the due process clause of the Fifth Amendment. He also urged here that such a classification of the Japanese descended citizens from others, in a unitary scheme leading to their imprisonment without a hearing, (1) made General DeWitt's Congressionally authorized regulation a bill of attainder prohibited by Article I of the Constitution; (2) was merely an incident of a single continuing plan to seize his person in violation of the Fourth Amendment, and (3) that the scheme providing for deporting people from their homes to be imprisoned by the Military, without trial, is a cruel and unusual punishment in violation of the Eighth Amendment.

It is now nearly ten months since General DeWitt's deportation order was made. The highest court of this great circuit is fully able to decide the submitted questions. The difference in time between certification and certiorari after our decision, is about four weeks if diligence is used by the Government in filing its sustaining or opposing brief. The time no doubt could be shortened by the agreement of counsel for the appellants seeking the freedom of their clients.

Because of this difference in time, the Supreme Court may have to reconvene in June or July, as it did in the much lesser important cases of Ex parte Richard Quiren and others, argued July 29, and July 30, 1942. It is my opinion that a month's delay, coming after the elapse of the ten months in which the order in question has been in existence, does not warrant the avoidance of a decision of this circuit court of appeals on the matters of law and of fact involved in the appeals.

For the above reasons I dissent from the attempt by certification to avoid the decision of this appeal by this court, and if it is to be avoided from omitting from the certificate the facts above described. I cannot but regret that this opinion is an overnight effort, without the required revision, but the certificate signed by a majority of the court was first seen by me yesterday (March 27th) and ordered sent at once by airmail to the Supreme Court.

March 28, 1943.

WILLIAM DENMAN,
United States Circuit Judge.

Endorsed: Opinion by Denman, Circuit Judge, on his dissent from the certification of questions to the Supreme Court, and from the omission of facts therefrom. Filed March 28, 1943. Paul P. O'Brien, Clerk.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1942

No. 870

GORDON KIYOSHI HIRABAYASHI, *Appellant,*

against

UNITED STATES OF AMERICA, *Appellee.*

APPELLANT'S REPLY BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM 1942

No. 870

GORDON KIYOSHI HIRABAYASHI,

Appellant,

against

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF

The government (pp. 10-32) asks this Court to take judicial notice of a mass of material as justification for the issuance of the military orders. Most of this material, however, consists merely of opinions held by various persons—much of it, indeed, mere suspicion. However, equally strong contrary views have been widely expressed.[1] Even the facts related in the brief are of doubtful relevance, since they form only a partial picture of the situation. Nothing in the record indicates what facts were considered by the military authorities.[2] Indeed, the record is wholly barren of evidence in justification of the

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[1] The subject is fully treated in the brief filed herein by Japanese-American Citizens League, *amicus curiae*. See also McWilliams, *Brothers Under the Skin* (1943).

[2] Indeed, recent testimony by General DeWitt indicates that prejudice dominated his thinking. He opposed a proposal that some Japanese be returned to the West Coast and said, "A Jap's a Jap, it makes no difference whether he is an American citizen or not" (see *San Francisco News*, April 13, 1943, p. 1). We print the relevant portion in an appendix, page 25, *infra*.

orders. And the orders themselves make no explanation of the reason for singling out citizens of Japanese ancestry beyond the bare statement of conclusion that there was military necessity (see Proclamations Nos. 3 and 7, main brief, pp. 27, 29). The exclusion order itself (No. 57, main brief, p. 31) does not even give that reason.

Under the circumstances, we submit the elaborate structure erected by the government rests on sand. For it lacks the necessary foundation of legislative declaration that the proposed action is in the public interest. Without such declaration there is no ground for any presumption of regularity. The presumption of constitutionality attaches only to statutes, not to executive or military orders. Any person seeking to interfere with the liberty of the citizen must justify his acts by proof that there was substantial reason for doing so. Here no such proof was attempted. If it be argued that the Act of March 21st constituted such a legislative declaration, the answer is, as we will elaborate hereafter, that it cannot be so construed as to contemplate the singling out of Japanese citizens, and that the law is invalid on various grounds.

The government lists certain factors which it says justify the discrimination against Japanese: That they bear resentment against earlier acts of discrimination and have not been assimilated (pp. 20, 21), that many of them hold dual citizenship (pp. 24, 25), that a considerable number of them are Shintoists and revere the Emperor of Japan as a deity (pp. 26-28), that some of their children have been educated in Japan (pp. 28, 29), and that Japanese language schools were maintained on the west coast (pp. 30, 37). The exhaustive brief of the Japanese American Citizens League as *amicus curiae* has discussed these various contentions and has shown that they either rest on pure conjecture or are without relevance. Moreover, every one of these factors exists also with regard to other foreign groups in this country, especially the Italians and the Germans.

The sum and substance of the government's argument, however, is that because some small unidentified number of Japanese may be dangerous, it was proper to take action against them all. That, we submit, is a position without merit. For here action was not taken against any group which itself might have the elements which are considered dangerous—the action was not taken, for instance, against Shintoists, or against Japanese of dual citizenship, or against persons educated in Japan. It was taken not against individuals who might be objectionable, but against a class, which the government admits was as a whole loyal (pp. 34, 36).

The government also suggests (pp. 31, 32, 46) that the possibility of civil disorder against Japanese was justification for the orders. On this subject we quote Mr. Justice Day, in *Buchanan* v. *Warley*, 245 U. S. 69, 81:

> "It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the federal Constitution."

In discussing the military situation (pp. 12-15) the government ignores altogether the enormous distances involved. Thus San Francisco is 2,400 miles from Honolulu and Midway is 1,300 miles further. And from Seattle to Attu is 2,600 miles. It was suggested during the argument that these distances are unimportant on account of the aeroplane. But invasion cannot be accomplished from the air alone. If the Germans were unable to accomplish this across the narrow English Channel there was no reasonable basis for believing that Japan could invade our coast by air across the wide Pacific Ocean.

And in referring to the war industries on the West Coast (pp. 17, 18) the government proves too much. For surely the Germans and Italians were as concerned as the Japanese to damage these. Yet nothing was done to disturb

the very large Italian and German born populations on the West Coast (see Tolan Report, House Document, 2124 at p. 230).

1. The Orders Were Not Authorized by the Statute

The government (pp. 37-42) argues that the orders were authorized by the statute primarily because the purpose of the statute was to confirm the President's Executive Order No. 9066. It should be noted, however, that that order itself did not authorize discrimination against the Japanese as a group, it did not suggest that entire counties and cities would be declared military areas; it did not authorize removal without any hearings. Consequently, nothing can be read into the Act of Congress more than was in the President's Executive Order.

The comments from Representative Costello and Senator Reynolds quoted in the government's brief (notes 60, 61, p. 40), do not support the government's argument. There is nothing in these statements to indicate that wholesale evacuation of Japanese was contemplated. On the contrary, the implication was that only "certain individuals" would be barred, presumably because these were considered dangerous.

The government finally contends (p. 42) that even if the statute did not authorize what was done by the military authorities, Congress ratified what was done by appropriating money for the War Relocation Authority (56 Stat. 704, adopted July 25, 1942). We submit that no such inference can be drawn from the appropriation and moreover, that it would be unconstitutional to do so in this case. Surely it is stretching the doctrine of ratification very far to suppose that the provision of money to take care of the evacuated Japanese, helpless wards of the government, both aliens and citizens, is to be construed as approval of what had been done by the Army with regard to citizens. In any case, ratification can never be invoked in aid of a

criminal prosecution for an act committed prior to the ratification. That would be a violation of the prohibition against *ex post facto* laws (Const., Art. I, sect. 9). See *United States* v. *Stafoff*, 260 U. S. 477; *Viereck* v. *United States*, 318 U. S. . There can be no question but that the prohibition applies in this case, for the wrongful acts charged in the indictment occurred in May, 1942 (R. 2) and the supposed ratification did not take place until July 25, 1942. The cases cited by the government (*Brooks* v. *Dewar*, 313 U. S. 354; *Isbrandtsen-Moller Co.* v. *United States*, 300 U. S. 139) are wholly inapplicable: these were suits to restrain official action brought after the ratification had occurred.

We submit, therefore, that there is no justification for the government's contention that the Act was either authorization or ratification of what was done.

2. The War Power of Congress Does Not Support the Orders

If it be held that the Act of March 21, 1942, gave the President authority to issue the orders in question, we submit it was beyond the power of Congress to vest the military authorities with this control over civilians.

Even if it be assumed that the emergency of war might justify the evacuation of a particular racial group from so many communities, either because of the group's potential danger to the war effort, or because of hostility to the group on the part of the remaining population, we submit that there is no constitutional warrant for the use of military power to accomplish the objective. It is wholly fallacious to suppose that the war power and military power are correlative. Congress, indeed, has vested the President with vast powers in connection with the conduct of the war, but it has placed these in civilian hands. Such was the nature of Congressional action in connection with the draft (50 U. S. C. A. App. 310) and the fixing of prices (50 U. S. C. A. App. 921).

This is no idle matter of form. It is the essence of a free country that civil power be dominant. And this should be so even during a war.

None of the American cases cited by the government [3] (p. 50) indicates otherwise. Certainly, there is no similarity between what was done here and the acts approved in the cases cited. The *Lockington* cases involved only enemy aliens; the *Sparhawk* case the removal of property to prevent its falling into enemy hands.

As to the English cases [4] cited on pages 50, 51, there is no basis for any analogy. England has no written constitution, its courts recognize no right to pass on the validity of Acts of Parliament. Therefore, once Parliament has spoken, the only question for the courts is the construction of the law. It should be pointed out, moreover, that England has authorized no mass evacuation, such as was ordered on the West Coast; that there has been no discrimination based on race; that during the present war civilians alone have the power to order evacuation, and that each person ordered evacuated is given a hearing before an advisory committee, at which the grounds of the action taken against him must be stated to him. The regulations quoted in the government's brief (note 67, pp. 50, 51) deal only with evacuation in connection with anticipated military actions. The regulations which authorize evacuation of persons considered dangerous are set out in the *Liversidge* case [1942] 1 A. C. 206 (see also Carr, Regulated Liberty, 42 Col. Law Rev., 399, 346).

The government points out (pp. 42-44) that no question of martial law is here involved. With this we agree. But we do not agree with the inference which the government seeks to draw. On the contrary, we contend that in the

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[3] *Lockington* v. *Smith*, 1 Pet. C. C. 466, Fed. Cas. No. 8448; *Lockington's Case*, Brightly N. P. (Pa.) 269; *Respublica* v. *Sparhawk*, 1 Dallas 357.

[4] *Ronnefeldt* v. *Phillips*, 35 T. L. R. 46; *Liversidge* v. *Anderson* [1942], 1 A. C. 206; *Greene* v. *Secretary* [1942], 1 A. C. 284.

absence of martial law what was here done was beyond the constitutional power of the government.

It is suggested (p. 43) that this Court need not consider the extent to which the *Milligan* case controls. But the government ignores altogether the definition of the limitations of military power which was apparently accepted by all of the judges in that case and which we quoted in our main brief (pp. 11 and 12).

Certainly, the government can draw no support from the English cases. The statement in its brief (note 62, p. 43) that the English and Irish courts no longer follow the *Milligan* case is not correct, and the cases cited [5] do not so hold. While it is true that these courts have held that martial law might properly be declared, although, for some purposes, the ordinary courts were open, they all agree with the decision of the majority in the *Milligan* case that actual warfare or disorder is an essential accompaniment of martial law, and that the courts will determine whether the facts justify the declaration of martial law. (For the convenience of the Court we print excerpts from that decision in the Appendix, pp. 26, 27, *infra*.)

We submit, therefore, that the power here exercised by military authority is entirely outside the proper function of the military, and that if Congress has any constitutional right to decree evacuation, it could not entrust the army with such power, but was required to place it in civilian hands. The problem was essentially a civilian, not a military one.

3. The War Power of the President Does Not Support the Orders

The government argues (pp. 52-56) that the President had power to authorize the military orders even without

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[5] *Ex parte Marais* [1902], A. C. 109; *The King* v. *Allen* [1921], 2 Ir. R. 241; *The King (Garde)* v. *Strickland* [1921], 2 Ir. 317; *The King (Roncyne)* v. *Strickland* [1921], 2 Ir. 333.

Congressional approval because of the war powers granted him by the Constitution. The only powers granted are those of Commander in Chief (Const., Art. II, §2). We submit that these powers have never been construed so as to give the President the right to control either persons or property within the United States. This Court expressly so ruled with regard to an attempt to seize British owned property during the War of 1812. In *Brown* v. *United States*, 8 Cranch 110, Chief Justice Marshall pointed out that the President's powers with regard to persons and property were correlative, that Congress had given him the right to detain alien enemies, but not the right to seize their property. The omission was considered decisive. So the Court held the seizure of the property beyond the war power of the President. And since Congress has given the President the power to detain aliens (50 U. S. C. A. 21), but not citizens (unless the Act of March 21, 1942, be construed so as to grant such power), it follows by like reasoning that the power of the President does not extend to the orders here under review.

The only case cited by the government which upholds Presidential power unaided by Congressional authorization is *The Prize Cases*, 2 Black 635. But the situation there presented is wholly unlike that in the case at bar. There the President was dealing with persons and property in enemy territory, not with citizens peacefully residing in their homes.

Appellant does not dispute the right of the President to order the military authorities to take over any particular place which is necessary for defense purposes and to exclude civilians from such a place. Today there are anti-aircraft and other guns at strategic points, there are military encampments in various parts of the country. Over these the military necessarily and properly have full control. And in anticipation of actual invasion the army could no doubt take over any place it thought necessary for the disposition of its forces. But when banning people from true military areas, or even when evacuating the civilian

population from other areas in time of actual military operations, the army would be acting on considerations quite different from those here involved. For here the military assumed the power to act with regard to immense stretches of country, including whole cities, such as San Francisco, Los Angeles, Seattle and Portland, and acted in the absence of any actual warfare and without regard to the disposition of military personnel.

The right to interfere with civilian life to the extent here directed is not given to the President by the Constitution. It forms no part of his function as Commander-in-Chief. None of the authorities cited by the government hold otherwise. It is significant, for instance, that Mr. Berdahl, in his book, "War Powers of the Executive in the United States" (cited by the government, p. 54), nowhere suggests that the powers of the President as Commander-in-Chief extend to the removal of citizens. In Chapter 9 (pp. 152 ff.), he discusses military government, but makes clear that this deals only with occupied territory. The only situation in which the executive authority may be exercised over citizens is where martial law has been declared, but that, says Mr. Berdahl, requires a formal proclamation. And of course, there was none here. In discussing the President's power of police control, which Mr. Berdahl considers to be a civil, not a military, function of the Presidential war power (Chapter 11, pp. 183 ff.), he recognizes that the power of the President over persons is derived only from Congressional authorization. Moreover, he expresses grave doubt of the power of the President to deal with citizens at all in the absence of a suspension of the writ of habeas corpus (p. 188). The most that he concedes is that when Congress is not in session the President may have power to act in an emergency (p. 192). Here, of course, Congress was continuously in session, and the writ of habeas corpus has not been suspended.

We submit, therefore, that the war powers of the President form no justification for what was done.

4. With Regard to Racial Discrimination

The government claims that there was a rational basis for the discrimination against citizens of Japanese ancestry, but it can find no cases supporting that contention. The cases which deal with generalizations about classification (p. 57) all rest on the proposition that the Legislature may make a reasonable classification. Here Congress has made no classification whatever. The cases which uphold restrictions against aliens[6] are not helpful, for the case of the alien is always different. This was expressly recognized in the *Clarke* case cited by the government (p. 60). Moreover, we are not here concerned with action directed against aliens. Finally, the government cites cases[7] which uphold segregation between races. We suggest that these cases should not be given new life by this Court at this time. They rest on the proposition that where there is equality of treatment between persons of different races mere separation is not unconstitutional. This is not the place to point out how unrealistic was the attitude which permitted a race which considered itself to be dominant to treat another race as inferior by segregating it. But at least the supposition in those cases was that equality of treatment actually occurred. No one can argue here that there was any equality of treatment in connection with the curfew and exclusion orders. All groups except the Japanese were allowed to remain in their homes and follow their occupations. Japanese alone were removed to camps as a group. This is segregation, but it surely is not equality.

The government evidently recognizes the fact that the cases it cites do not support its position. It seems to sug-

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[6] *Patsone* v. *Pennsylvania*, 232 U. S. 138; *Clarke* v. *Deckebach*, 274 U. S. 392; *Terrace* v. *Thompson*, 263 U. S. 197, and its companion cases.

[7] *Plessy* v. *Ferguson*, 163 U. S. 537; *Gong Lum* v. *Rice*, 275 U. S. 78.

gest, however, that the action taken was not on the basis of race (p. 35, and footnote 70 on p. 59). In so far as the action was directed also against others than Japanese, it was directed against them either because they were aliens or because of objections to particular individuals. No citizens were involved as a class other than the Japanese. Consequently, the orders, in so far as they were directed against American citizens of Japanese ancestry were directed against them solely on account of their race, and were directed at no other groups on like grounds.

The suggestion (p. 35) that the government did not act on the basis of race, but on the existence within the group of persons who were a "threat to the security of the nation" is remarkable indeed, for these orders were not directed only at persons who were such a threat, and the basis of the supposed threat was solely the race of the persons involved. It appears, therefore, that the orders were based solely on race and were lacking in justification.

5. The Question of Hearings

The government argues (pp. 62 ff.) that hearings were impracticable both because of the time they would take and the impossibility of ascertaining the facts. And it also contends (pp. 63, 64) that there was no legal need for hearings since there was no factor involved about which a hearing could be held. We shall first consider this argument, since the other points in a measure depend on this one.

The basis of the argument is that the removal was not motivated by the possible disloyalty of the citizens of Japanese ancestry, but that the reason for the evacuation was the danger of their continued presence on the West Coast (pp. 63, 64). But when we look to other portions of the government's brief to see how the existence of such a danger is justified we find the chief point to be the possible disloyalty of some of these citizens (pp. 20-28, 34, 46).

Stress is laid on their family ties, on their religion, on Japanese propaganda, on the danger which might exist in case of invasion because of acts of sabotage and espionage that might be committed by some of these citizens. Indeed, both the President's Executive order and the various military proclamations stress this last mentioned danger. So if the danger rests on disloyalty it is disloyalty that is the determining factor. Just so, in the sterilization cases (see main brief, p. 21) there was danger to the community from breeding by certain groups, but that danger depended on the transmissibility of factors tending to crime or imbecility. Therefore, any individual affected must have the right to show that in his case the factor did not exist which might produce the danger. Likewise, here each citizen affected should have the right to show that there was no basis in fact for the apprehension of danger, that he was not disloyal.

The government also argues (p. 63) that since the class as a whole was a proper object of action, individual hearings are irrelevant. That is not the holding of this Court in the sterilization cases we have just referred to. Nor does *Jacob Ruppert* v. *Caffey*, 251 U. S. 264, justify the argument. Here we are not dealing with an isolated, innocuous person found in a group overwhelmingly harmful. On the contrary, even the government admits the majority of the Japanese are loyal (pp. 34, 46). The argument has been turned upside down. The government claims that because certain individuals may be harmful the entire group must suffer. That is not American law.

But it is said (p. 62) that there was a pressing emergency, and that such hearings would take too long. It is not, however, to be supposed that everyone affected by these orders would have claimed the right to a hearing. It is obvious that this evacuation was caused in large part by prejudice against the Japanese: that the Japanese realized that this prejudice existed, and that perhaps a large number of those evacuated were satisfied to be taken

care of by the government during the war period. But constitutional rights are not dependent on the will of the majority, not even on the will of the majority of those affected by any action of the government. They exist for the protection of each individual; they constitute in that regard the great glory of our system of government. Therefore, no argument of difficulty justifies the utter denial of hearings. And since the machinery which was established made no provision for any hearings, it is void.

Then the government argues (pp. 62, 63) that no hearing could determine whether a given individual was loyal or not. That is an argument that no representative of the Department of Justice should make. For all justice rests on the assumption that inquiry may develop the truth. Of course, in a given case, it may not do so. Injustices result on both sides of the picture: the guilty are let go, the innocent may be detained. But those are the risks inherent in a democratic society that prides itself on having a system for the administration of justice in which reason, not passion or prejudice prevails. Besides, the government has used hearings of the kind here suggested in almost identical situations, and apparently with great success. The government has brought many suits to cancel naturalization on the ground that naturalized Germans retained allegiance to their native land (see *United States* v. *Wezel*, 49 F. Supp. 16; *United States* v. *Meyer*, 48 F. Supp. 926). In dealing with enemy aliens, as to whom the government has plenary powers, the Department of Justice has set up boards in various parts of the country. All aliens of German or Italian nationality about whom there was any ground for suspicion have passed before these boards. Only those found to be dangerous have been interned. The others are at large. If this was done with the hundreds of thousands of these enemy aliens it could certainly have been done with the relatively few thousand citizens of Japanese ancestry who would have asked for the right to a hearing. It must not be forgotten that the Department of Justice had no doubt thoroughly

investigated all suspected Japanese long before Pearl Harbor and was continuously engaged in that process.

The government closes its discussion of this part of the case with a quotation from Lord Macmillan (*Liversidge* v. *Anderson* [1942], 1 A. C. 206, 257) to the effect that since in war people can be drafted, and therefore perhaps lose their lives, there is no limitation on the power of the government to do less. That may be good law in England, where there is no written constitution. Certainly, it is not good law in the United States. Moreover, the fact that a man of military age may be drafted under regulations which give due regard to his situation in life, and set up machinery for review, is not justification for military orders interning men, women and children of all ages simply because of their race, and with no possibility of review.

6. With Regard to Delegation

The argument of the government is that there was no delegation because the main lines of the intended action were known at the time the law was passed (p. 66), and that delegation in aid of the war power is free from constitutional restriction (p. 67).

The first of these points is indeed remarkable. Let us consider its implications. The legislative power was vested by the Constitution in the Congress in the evident belief that there would be public deliberation on all matters considered by that body. Such deliberation, moreover, would be followed by a vote which normally would record the position of the members, and it might be preceded by hearings in which the public could present its views. In other words, the legislative process involves consideration of the issues, or at least makes such consideration possible. Therefore, if the country was to embark on so revolutionary a proceeding as the evacuation and detention of a particular group of its citizens, the orderly constitutional process would be the introduction into the Congress of a bill pro-

viding precisely for such evacuation and detention and setting up machinery for their accomplishment.[8] Then the public and the members of Congress could have debated the issue, even in the emergency of war. But to say that this legislative process was carried out through the short cut of a blank check is utterly to misconceive the nature of the problem.

The further argument that war permits delegation unthinkable in time of peace is without support in any authorities. The *Curtiss-Wright* case, 299 U. S. 304, so heavily relied on (p. 69), does not support that conclusion. There this Court pointed to the fact that the President's power in foreign affairs existed independent of the Constitution and recognized the force of a long line of laws granting him wide discretion in that field. But the war power derives directly from the Constitution, and is there divided between the President and the Congress. It is the latter body that is charged with the enacting of laws to carry on the war; the President is merely made Commander-in-Chief of the armed forces.

There is every reason to suppose, therefore, that in this field of legislation, as in any other, Congress must define the general policy it desires to accomplish and set standards, while free to leave to administrators wide discretion in filling in the details. And that has not been done here. For the Act of March 21, 1942, lays down no real policies at all. True, it appears to authorize the exclusion of citizens from military areas. If the orders had been confined to the exclusion of citizens from forts and other such places there could be no complaint (Cf. *United States v. Grimaud*, 220 U. S. 506). But the military have assumed that the law gave them much greater power than that, indeed the power to legislate concerning the liberty of motion of citizens in large areas that are military only by fiat, in

[8] In fact, such a bill was introduced, but not acted on. S. 2293, 77th Congress, 2d Session; see Senate Report, 1496.

which nothing but civilian affairs are transacted. Moreover, the military have assumed the right to make distinctions between groups of citizens. That is legislation for which no express warrant appears in the law. Either it was unauthorized by the law, or the law is void as an improper delegation.

There is nothing in the first World War transportation and telephone cases [9] (pp. 67, 68) which justifies what was done here. There Congress authorized the President to take over certain business in cases of war. This constituted no delegation of legislative power, but merely administrative power to fix rates. The only question was whether Congress had authorized the fixing of intrastate as well as interstate rates.

Nor is *Highland* v. *Russell Car Co.*, 279 U. S. 253 (p. 69) at all pertinent. That case dealt with the fixing of prices by administrative machinery, a field particularly suited to executive action. No policies were laid down by the Executive. The government (p. 69) relies also on *McKinley* v. *United States*, 249 U. S. 397. There the Secretary of War was authorized to prohibit houses of prostitution near army camps. The only question was the degree of proximity, which he fixed at five miles. There was no attempt on the part of Congress to authorize the Secretary to declare that whole cities and counties might be military areas, much less to regulate civilian life in such places.

We submit that if the Act of March 21, 1942, can be construed as authorizing what was done by the military, it vested them with legislative authority without fixing any standards whatever for the action of the military. It is no answer to say that the areas were to be military areas, and that the action to be regulated would be such as would naturally relate to such areas. For the areas here fixed were not military areas in any real sense, the

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[9] *Northern Pacific Co.* v. *North Dakota*, 250 U. S. 135; *Dakota Cent. Tel. Co.* v. *South Dakota*, 250 U. S. 163.

action taken was not such as would normally be taken with regard to military camps, forts, or other places where the military was actually functioning.

The government suggests (p. 70) that even if the law did delegate legislative powers, that is immaterial here because the President had power without Congressional action to do what was done. We have already shown that this last contention is without merit.

The Solicitor General suggested during the argument that the statute might be saved from condemnation by reading into it a provision limiting its application to "reasonable" military orders. It is difficult to see how that would save the statute. For it would still lay down no standards. Indeed the suggestion adds nothing to the statute, since it cannot be supposed that unreasonable orders would ever be valid ones. Moreover, how can a citizen know which orders are reasonable and which are not? If that change saves the statute from a charge of delegation it certainly makes it vulnerable on the score of uncertainty.

For no one can tell whether the order as applied to him is a reasonable military measure. That applies to the orders here in question and brings the statute under the rule announced by this Court when dealing with the war time Lever Act. For the Court held void for uncertainty that part of the statute which punished the exaction of any "unreasonable" price (*United States* v. *Cohen Grocery Company*, 255 U. S. 81).

The suggestion was also made during the argument that Executive Order 9066 imposes a limitation on the statute. This we respectfully submit is not so, nor, if so would it make any difference. In the first place, the statute is in no way limited; it does not prescribe a punishment only for disobedience of military orders issued under Executive Order 9066. In the second place, the Executive Order itself contains no standards, either as to the extent of the military areas, the classes of persons to be evacuated or the acts which might be regulated. If the Executive Order be con-

strued as applicable to the many thousands of square miles which General DeWitt on the West Coast and General Drum on the East Coast have declared to be military areas it gives such wide discretion to the military commanders to prescribe conditions under which civilians may "remain" in such areas that it is void.

Nor do the references in the order to espionage and sabotage save either the order or the statute. For there is no justification for vesting jurisdiction over such matters in the military, no suggestion, moreover, that the army issued its orders only against persons suspected of committing such offenses. Indeed, the Solicitor General, in effect, conceded that these references to espionage and sabotage did not establish standards, for he admitted, on questioning from the Court, that the Executive Order would not justify the removal of citizens of German ancestry from St. Louis merely because war plants and army camps were located in and near that city.

The truth of the matter is that no form of words, either in the statute, in the Executive Order or in the military orders, can avail in the absence of the required substance, namely, a declaration by Congress of legislative policy with regard to the evacuation of American citizens and the setting up of standards by which administrative action taken under such law could be tested. Nothing less complies with the command of the Constitution that it should be the Congress which is to legislate. And no running together of the various documents in this case constitutes any declaration of legislative policy or sets up any standards. In discussing this question, of course, we wish to remind the Court that we are assuming, but not admitting, that Congress might have power to order the deportation of citizens of a particular race without hearings and to entrust such deportation to the military authorities. These aspects of the case, however, have been discussed under other heads.

7. The Question of Vagueness

While the Government in its brief does not mention appellant's objection to the statute on the score of its vagueness, this subject is treated in the brief *amicus* filed by the States of California, Oregon and Washington (pp. 82, 83) and was discussed on the argument by the Solicitor General.

Both the Solicitor General and the three State Attorneys General rely on the provision of the statute which permits punishment only in case of knowledge of the existence and the extent of the orders and that the act complained of violated them. But such a provision cannot save this statute from condemnation on the ground of its vagueness since there is nothing in the statute from which a person can determine whether or not a particular order comes within its terms. When the Legislature appears to give carte blanche to an administrative agency, be it civil or military, the civilian acts with reference to orders of that agency at his peril. The fact that he cannot be convicted unless it is proved that he had knowledge of the orders issued by the agency helps him not at all.

For instance, in this particular situation how was any person to know whether the military were authorized to impose curfew orders? There is nothing in the statute other than the words "any acts" which can be construed to authorize the imposition of the curfew. Moreover, suppose the military had issued orders prohibiting certain citizens from exercising particular callings, or holding meetings? Would such orders have been authorized by the law? And how could the citizen possibly know? Indeed, the curfew order, Proclamation No. 3, includes a prohibition against traveling more than five miles from home at any time. What is the authority for such a restriction on the freedom of civilians?

We submit that neither the precision of the military orders or the requirement of knowledge of the orders are

of any consequence. A citizen is entitled to know whether administrative orders are authorized by law. That he cannot know unless the law itself is clear and definite.

Moreover, even the military orders themselves are vague when they relate to persons of "Japanese ancestry" without in any way defining that term. Did the military authorities intend to include only persons who were full blooded Japanese? And if they intended also to include persons descended from mixed marriages, how far back was the taint to run? Was it the intention of the military authorities to adopt the scheme of Nazi Germany's Nuremberg Laws against Jews, which classify as a Jew anyone who had a single grandparent who was Jewish? These are but some of the questions which present themselves in connection with the vague definition contained in the military orders.

How, under all these circumstances, could a person know what he was to do?

8. Appellant Has Standing to Raise the Constitutional Issues

The government argues (pp. 71-81) that since appellant was never detained in a camp he has no standing to question the constitutionality of the detention of other persons. However, appellant is not questioning such detention. He questions the military orders which imposed upon him the obligation to remain in his home at night, and within five miles of it during the day, and the obligation to report for the purpose of being evacuated. All of the discussion in this part of the brief would appear to be wholly irrelevant.

So it is also irrelevant that had appellant submitted to the illegal orders he might thereafter have been released from detention. This is all the more so since at the time the particular exclusion order of May 10th was issued

no provision had been made for the release of American citizens from detention. For the first order which contemplated authorization to leave the camps was made on June 27, 1942 (see brief, p. 77, footnote 77). The regulations with regard to the issuance of leaves were not issued until September 26, 1942 (p. 78, footnote 78). The first count of the indictment charged appellant with having failed to obey the order of evacuation on May 11, 1942 (R. 1, 2). Moreover, none of this discussion about camps would have any bearing whatever on the conviction for refusing to obey the curfew orders.

We submit, therefore, that it is wholly irrelevant that subsequent to the indictment appellant might have been released from camp had he first submitted himself to the illegal orders. In view of the fact that at the time when the orders were issued they contained no provision for release, there is not the slightest basis for the government's contention that appellant cannot challenge the constitutionality of the orders he is charged with having violated.

Conclusion

Before leaving this case with the Court, we wish to deal briefly with certain questions asked by members of the Court during the argument with regard to the Court's power to review military decisions. It was suggested that our position might subject all military decisions to judicial scrutiny. We do not so contend, nor do we believe that there is any difficulty in drawing a line of demarcation. We submit that whenever the military authorities interfere with the rights of civilians (be they citizens or friendly aliens) the Courts will scrutinize their acts in order to determine whether the claim of military necessity advanced by the military actually rested on considerations "immediate and impending" or whether the military acted on grounds "remote or contingent"—see *Mitchell* v. *Harmony*,

13 How. 115, 133, 134. In the former case the military decision will be accepted; in the latter it must be rejected. It is clear, therefore, that military decisions unrelated to the freedom of motion of civilians or the control of their property will not be subject to judicial scrutiny, but even these will be subject to judicial revision only where no actual military action was involved. We believe that this distinction, which has never heretofore been rejected by this Court, leaves ample room for the proper functioning of the military, while at the same time protecting civilians from despotic interference with their liberties.

We submit, moreover, that from the facts in this case the military acted on considerations that were remote and contingent. It was, no doubt, evident to the government for many years that war with Japan might take place. Its inevitability must have been plain no later than October or November, 1941. Yet the army had no plan for the evacuation of the Japanese population, nor did this appear to be necessary even after Pearl Harbor. The evacuation was not ordered until after various groups on the West Coast and the Congressional representatives for the Pacific states had brought pressure to bear on the President. The Court cannot ignore these undisputed facts in considering the claim of military necessity. The very fact that evacuation was spread over a period of nearly four months (from March 24th to July 22nd, see Government's brief, pp. 74-76) shows the absence of any immediate or imminent threat to the West Coast. The fact of the matter is that the military believed the measures justifiable in order to avoid espionage and sabotage. We submit that they have no authority to deal with such matters, except, of course, while conflict is raging or where the persons involved have come through military lines and are, therefore, subject to military law as decided by this Court in *Ex Parte Quirin*, 317 U. S. 1.

It is therefore respectfully submitted that the arguments advanced by the government are without merit and the conviction should be reversed.

Respectfully submitted,

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APPENDIX

Extracts from San Francisco News, April 13, 1943, pp. 1, 3

DeWitt Hits Coast Japs

Charges of a movement to bring American-born Japanese back to the Pacific Coast were made today by Lieut. Gen. DeWitt, commanding general of the Western Defense Command and Fourth Army, at a House naval affairs subcommittee hearing here. He said he would oppose this movement "with every effort and means at my disposal."

"I don't want any Jap back on the Coast," said General DeWitt, after informing the committee of "a feeling developing in certain sections and among certain elements" to bring these American-Japanese back to the Coast military area.

"There is no way to determine their loyalty," he declared. "This West Coast is too vulnerable. I am opposing this movement with every effort and means at my disposal.

"I have two problems—defending this Coast against espionage and sabotage by the Japs and driving them off the face of the map in the Aleutians.

"It makes no difference whether the Japanese is theoretically a citizen—he is still a Japanese. Giving him a piece of paper won't change him.

"I don't care what they do with the Japs as long as they don't send them back here. A Jap is a Jap." • • •

Rep. John Z. Anderson of the Eighth Congressional District said he had received protests from his constituents concerning the War Department's policy of allowing Japanese-Americans to serve in the Army.

'We'll Bury Them'

"We shipped 9000 Japanese out of my district—if any of them are sent back we'll bury them," Rep. Anderson said.

Rep. Izac assured General DeWitt the entire California congressional delegation is "closely watching the situation

in Washington. There won't be any Japanese sent back here."

"Wait and see," General DeWitt said, smiling grimly.

Extracts From Ex Parte Milligan

"By the protection of the law human rights are secured; withdraw that protection, and they are at the mercy of wicked rulers, or the clamor of an excited people."

"Time has proven the discernment of our ancestors; for even these provisions, expressed in such plain English words, that it would seem the ingenuity of man could not evade them, are now, after the lapse of more than seventy years, sought to be avoided. Those great and good men foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law. The history of the world had taught them that what was done in the past might be attempted in the future. The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence, as has been happily proved by the result of the great effort to throw off its just authority."

"It is claimed that martial law covers with its broad mantle the proceedings of this Military Commission. The proposition is this: that in a time of war the commander of an armed force (if in his opinion the exigencies of the

country demand it, and of which he is to judge), has the power, within the lines of his military district, to suspend all civil rights and their remedies, and subject citizens as well as soldiers to the rule of his will; and in the exercise of his lawful authority cannot be restrained, except by his superior officer or the President of the United States.

"If this position is sound to the extent claimed, then when war exists, foreign or domestic, and the country is subdivided into military departments for mere convenience, the commander of one of them can, if he chooses, within his limits, on the plea of necessity, with the approval of the Executive, substitute military force for and to the exclusion of the laws, and punish all persons, as he thinks right and proper, without fixed or certain rules.

"The statement of this proposition shows its importance; for, if true, republican government is a failure, and there is an end of liberty regulated by law. Martial law, established on such a basis, destroys every guarantee of the Constitution, and effectually renders the 'military independent of and superior to the civil power'—the attempt to do which by the King of Great Britain was deemed by our fathers such an offense, that they assigned it to the world as one of the causes which impelled them to declare their independence. Civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable and, in the conflict, one or the other must perish."

These portions of the *Milligan* case have often been cited with approval by this Court. The following is but a partial list of the cases:

Hamilton v. *Kentucky Distilleries Company*, 251 U. S. 146, 156 (Justice Brandeis)

United States v. *Cohen Grocery Company*, 255 U. S. 81, 88 (Chief Justice White)

Sterling v. *Constantin*, 287 U. S. 378, 402 (Chief Justice Hughes—with an extensive quotation)

Home Building and Loan Association v. *Blaisdell*, 290 U. S. 398, 426 (Chief Justice Hughes)

Schechter Poultry Company v. *United States*, 295 U. S. 495, 528 (Chief Justice Hughes).

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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 870

GORDON KIYOSHI HIRABAYASHI

v.

THE UNITED STATES OF AMERICA

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the District Court for the Western District of Washington (R. 9–18) is reported in 46 F. Supp. 657. The opinion of Circuit Judge Denman, dissenting from the certification of questions by the Circuit Court of Appeals, is not reported.

JURISDICTION

The certificate of questions of law upon which the Circuit Court of Appeals desired instruction for the decision of this case was filed on March 30, 1943. On April 5, 1943, this Court directed that the entire record be certified up to this Court

so that the whole matter in controversy might be considered. The jurisdiction of this Court rests on Section 239 of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The defendant, an American citizen of Japanese ancestry, was convicted under the Act of March 21, 1942, which made it a misdemeanor to violate restrictions prescribed by a military commander for a military area which had been designated as such in accordance with an executive order of the President. The violations consisted of wilful failure to observe an 8 P. M. to 6 A. M. curfew and to report at a designated place in connection with the exclusion of all persons of Japanese ancestry from that area. The validity of the conviction raises the following questions:

1. Whether the curfew and exclusion measures were within the war powers granted by the Constitution to Congress and the President.

2. Whether the exclusion of all persons of Japanese ancestry as a group was an unreasonable classification and denial of due process under the Fifth Amendment.

3. Whether the Act of March 21, 1942, making it a misdemeanor to violate orders of military commanders involves an invalid delegation of legislative power.

CONSTITUTION, STATUTES, ORDERS, AND PROCLAMATIONS INVOLVED

The various provisions of the Constitution, statutes, orders and proclamations involved are set forth in Appendices A, B, C, and D, *infra*, pp. 83–124.

The important statutory provisions, orders and proclamations may be summarized chronologically as follows:

The Joint Resolution of Congress of December 8, 1941, declared a state of war to exist with the Empire of Japan, authorized and directed the President to employ the entire naval and military forces and the resources of the Government to carry on the war and pledged all of the resources of the country to bring the conflict to a successful termination.

On December 11, 1941,[1] the eight Western States and the Territory of Alaska were activated by the War Department as the Western Defense Command and designated as a "theater of operations." An area approximately 100 miles wide extending from the Canadian border along the Pacific Coast to the California-Mexican border was declared to be a "combat zone."[2]

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[1] General Order No. 1, December 11, 1941. See record in *Yasui* v. *United States*, No. 871, pp. 79–80.

[2] "The theater of war comprises those areas of land, sea, and air which are, or may become, directly involved in the conduct of the war.

"A theater of operations is an area of the theater of war necessary for military operation and the administration and

On February 19, 1942, the President issued Executive Order No. 9066 in which he recited the necessity for protection against espionage and sabotage and in which he authorized the Secretary of War and Military Commanders designated by him, whenever such action was necessary—

> * * * to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion * * *.

Pursuant to the aforesaid Executive Order and the authority vested in him by the Secretary of War, Lieutenant General John L. DeWitt, Commanding General of the Western Defense Command and Fourth Army, in Public Proclamation No. 1, *infra*, p. 97, on March 2, 1942, declared the Pacific Coast of the United States (which area is included in the Western Defense Command) to be, because of its geographical location—

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supply incident to military operation. The War Department designates one or more theaters of operation.

"A combat zone comprises that part of a theater of operations required for the active operation of the combatant forces fighting" (Field Service Regulations—Operations, War Department, May 22, 1941, Field Manual 100–5, pars. 1–2).

> * * * particularly subject to attack, to attempted invasion by the armed forces of nations with which the United States is now at war, and, in connection therewith, is subject to espionage and acts of sabotage, thereby requiring the adoption of military measures necessary to establish safeguards against such enemy operations.

This proclamation designated certain areas within the Western Defense Command as "Military Areas" and "Military Zones" and declared that "such persons or classes of persons as the situation may require" would, by subsequent proclamation, be excluded from certain of these areas, and further declared that with regard to other of said areas "Certain persons or classes of persons" would be permitted to enter or remain therein under certain regulations and restrictions to be subsequently prescribed.

Public Proclamation No. 2, *infra,* p. 101, dated March 16, 1942, issued by General DeWitt, designated further Military Areas and Military Zones, and contained a recital similar to the one in Public Proclamation No. 1 concerning the exclusion of persons or classes of persons, from these areas, and regulations and restrictions applicable to persons remaining within them.

Executive Order No. 9102, dated March 18, 1942 (7 F. R. 2165), established the War Relocation Authority in the Office for Emergency Management in the Executive Office of the President;

authorized the Director of the War Relocation Authority to regulate and effectuate a program for the removal, relocation, maintenance, and supervision of persons from areas designated pursuant to Executive Order No. 9066; and authorized the Director to prescribe regulations necessary or desirable to promote effective execution of the program.

The Act of March 21, 1942, *infra,* p. 86, provides that whoever shall enter, remain in, leave or commit any act in any military area or zone prescribed under the authority of Executive Order of the President by the Secretary of War or a military commander designated by him, contrary to the restrictions applicable to any such area or zone, or contrary to the order of the Secretary of War or any such military commander shall, if it appears that he knew or should have known of the restrictions and order and his act was in violation thereof, be guilty of a misdemeanor.

Public Proclamation No. 3, *infra,* p. 105, dated March 24, 1942, recited that the present situation within the previously described Military Areas and Zones required—

> as a matter of military necessity the establishment of certain regulations pertaining to all enemy aliens and all persons of Japanese ancestry within said Military Areas and Zones * * *

and this Proclamation established the following regulations:

> 1. From and after 6:00 A. M., March 27, 1942, all alien Japanese, all alien Germans, all alien Italians, and all persons of Japanese ancestry residing or being within the geographical limits of Military Area No. 1, or within any of the Zones established within Military Area No. 2, as those areas are defined and described in Public Proclamation No. 1, dated March 2, 1942, this headquarters, or within the geographical limits of the designated Zones established within Military Areas Nos. 3, 4, 5, and 6, as those areas are defined and described in Public Proclamation No. 2, dated March 16, 1942, this headquarters, or within any of such additional Zones as may hereafter be similarly designated and defined, shall be within their place of residence between the hours of 8:00 P. M. and 6:00 A. M., which period is hereinafter referred to as the hours of curfew. * * *

Beginning March 24, 1942, General DeWitt also issued a series of Civilian Exclusion Orders, pursuant to the provisions of Public Proclamation No. 1, each such order relating to a specified area within the territory of his command. The order applicable to the defendant herein was Civilian Exclusion Order No. 57, issued May 10, 1942, *infra*, p. 119; it declared that from and after 12 o'clock noon, May 16, 1942, all persons of

Japanese ancestry be excluded from a specified portion of Military Area No. 1 in Seattle, Washington, including the place of residence of the defendant, and required a responsible member of each family and each individual living alone affected by the order, to report on May 11 or 12, 1942, to a designated Civil Control Station in Seattle, Washington.

Meanwhile, General DeWitt had issued Public Proclamation No. 4 on March 27, 1942, which recited the necessity of providing for the welfare and assuring the orderly evacuation and resettlement of the Japanese, and provided that commencing midnight March 29, 1942, all Japanese were prohibited from leaving the military area until future orders would permit or direct.

STATEMENT

The defendant was found guilty under an indictment for violating the Act of March 21, 1942 (Public Law No. 503, 77th Congress, 2d Sess.). The indictment had been returned in the United States District Court for the Western District of Washington, and was in two counts. The first count charged that the defendant, a person of Japanese ancestry residing in Seattle, Kings County, Washington, failed to report to a designated Civil Control Station in Seattle on May 11 or 12, 1942, as required by the terms of Civilian Exclusion Order No. 57 of May 10, 1942, *infra,* p. 119, issued by Lieutenant General John L. DeWitt, Commanding

General of the Western Defense Command and Fourth Army, and that the defendant knew or should have known of the existence and extent of the order. (R. 1–2.)

The second count of the indictment charged that the defendant on or about May 4, 1942, between the hours of 8 p. m. and 6 a. m., was not within his place of residence as required by General DeWitt's Public Proclamation No. 3 of March 24, *infra,* p. 105, effective on and after 6 a. m. March 27, 1942, for all persons of Japanese ancestry, and that the defendant knew or should have known of the existence and extent of those restrictions (R. 2–3).

An amended demurrer (R. 5–8) and a plea in abatement (R. 8–9) alleging that the defendant never was a subject of, and never bore allegiance to, the Empire of Japan, were overruled and denied (R. 18–19).

The Government's evidence showed that the defendant had failed to report to the Civil Control Station on May 11 or May 12, 1942, to register for evacuation, and that the defendant had admitted his failure to do so by reason of a conviction that he would be waiving his rights as an American citizen (R. 32). The evidence also showed that for like reason he was away from his residence after 8 p. m. on May 9, 1942 (R. 33).

The defendant offered to prove that his parents were born in Japan of Japanese ancestry; that subsequent to their conversion in the Christian reli-

gion they came to the United States; that they were married in the United States and have never returned to Japan (R. 31–32); that the defendant was born in Seattle on April 23, 1918, and educated in the public schools and at the time of his arrest was a senior at the University of Washington majoring in mathematics (R. 34); that the defendant has never been to Japan and has never had any connection with the Japanese living in Japan; that the defendant has been active in the Boy Scout Movement and the University Y. M. C. A. (R. 34); that the defendant honestly believed that the exclusion order and curfew regulation discriminated against him purely on the basis of race or color and were unconstitutional and that for him to obey them voluntarily would be a waiver of his constitutional rights; that the defendant believed that it was his right and his duty as an American citizen to refuse to obey the exclusion order and the curfew regulation and to defend the prosecution in order to have the constitutional questions determined. (R. 34–35.)

The defendant was found guilty on both counts (R. 19), and was sentenced to three months imprisonment on each count, the execution of the sentence on both counts to run concurrently (R. 24).

FACTS UNDERLYING THE CHALLENGED ORDERS AND PROCLAMATIONS

The record in this case does not contain any comprehensive account of the facts which gave rise to the exclusion and curfew measures here

involved. These facts, which should be considered in determining the constitutionality of the Act of March 21, 1942, as here applied, embrace the general military, political, economic, and social conditions under which the challenged orders were issued. These historical facts, which we shall endeavor to set forth, are of the type that are traditionally susceptible of judicial notice in considering constitutional questions,[3] and in particular, many of these facts appear in official documents, such as the contemporary Tolan Committee's reports (H. Rep. No. 1911 and No. 2124, 77th Cong., 2d Sess.), which are peculiarly within the realm of judicial notice.[4]

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[3] See *Chastleton Corp.* v. *Sinclair*, 264 U. S. 543, 548; *Adkins* v. *Children's Hospital*, 261 U. S. 525, 560; *The Appollon*, 9 Wheat. 362, 374; *Mugler* v. *Kansas*, 123 U. S. 623, 622; *Austin* v. *Tennessee*, 179 U. S. 343, 348; *Schaefer* v. *United States*, 251 U. S. 466, 472–473; *Meyer* v. *Nebraska*, 262 U. S. 390, 403; *Liggett Co.* v. *Baldridge*, 278 U. S. 105, 113–114; *Alberto* v. *Nicolas*, 279 U. S. 139; *The Atchison, etc. Ry. Co.* v. *United States*, 284 U .S. 248, 260; *Central Kentucky Co.* v. *Comm'n*, 290 U. S. 264, 274; *Ashwander* v. *Valley Authority*, 297 U. S. 288, 327; *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379, 399; *Labor Board* v. *Jones & Laughlin*, 301 U. S. 1; *Ohio Bell Telephone Co.* v. *Comm'n*, 301 U S. 292, 301 See also Wigmore, *Evidence* (3rd ed. 1940), sec. 4L. 2555; Barnett, *External Evidence of the Constitutionality of Statutes*, 58 Am. L. Rev. 88 (1924); Bikle, *Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action*, 38 Harv. Law Rev. 6 (1924).

[4] See *Hoyt* v. *Russell*, 117 U. S. 401, 405; *Jones* v. *United States*, 137 U. S. 202, 216; *Brown* v. *Piper*, 91 U. S. 37, 42; *Shapleigh* v. *Mier*, 299 U. S. 468, 475; *Labor Board* v. *Jones & Laughlin*, 301 U. S. 1, 43; *Arizona* v. *California*, 283 U. S. 423, 453; *United States* v. *Carolene Products Co.*, 304 U. S.

A

THE MILITARY SITUATION ON THE PACIFIC COAST

The exact and detailed military situation affecting the Pacific Coast after the attack on Pearl Harbor, which was within the personal and official knowledge of the President, the Secretary of War and General DeWitt when it was determined that the entire Japanese population should be evacuated, was a closely guarded military secret. It was not a matter of public knowledge then or now, and probably cannot be a matter of public knowledge at least until the military authorities decide that there is no possible military risk. However, the facts about the military situation which were then publicly known or have since been disclosed may be stated in support of the action taken.

Japanese Victories.—On the morning of Decembed 7, 1941, the Japanese attacked the United States Naval Base at Pearl Harbor without warning. Simultaneously they struck against Malaysia, Hong Kong, the Philippines, and Wake and Midway Islands.

On the day following, the Japanese Army invaded Thailand. Shortly thereafter, the British battleships "H. M. S. Wales" and "H. M. S. Repulse" were sunk off the Malay Peninsula. The

144, 148–150; *H. J. Heinz Co.* v. *Labor Board*, 311 U. S. 514, 523–524; *Nebbia* v. *New York*, 291 U. S. 502, 516–521; *Muller* v. *Oregon*, 208 U. S. 412, 419–421; *Phelps Dodge Corp.* v. *Labor Board*, 313 U. S. 177, 183–184; cf. *Jacobson* v. *Massachusetts*, 197 U. S. 11, 31–34. See also Wigmore, *Evidence* (3rd ed. 1940), Sec. 2567a; Thayer, *Preliminary Treatise on the Law of Evidence* (1898), pp. 307–308.

enemy's successes continued without interruption. On the 13th of December, Guam was taken, and on December 24th and 25th, respectively, the Japanese captured Wake Island and occupied Hong Kong. On January 2nd Manila fell and on February 10th Singapore, Britain's great naval base in the East, fell; on the 27th of February the battle of the Java Sea resulted in a naval defeat to the United Nations. Thirteen United Nations' warships were sunk and one damaged, whereas Japanese losses were limited to two warships sunk and five damaged.

On the 9th of March the Japanese forces established full control over the Netherlands East Indies; Rangoon and Burma were occupied. Bataan and Corregidor, which were then under attack, subsequently gave way on April 9 and May 6, respectively. The Philippines had completely fallen.

Thereafter, on June 3rd, Dutch Harbor, Alaska, was attacked by Japanese carrier-based aircraft. And on June 7th, contemporaneously with an attack on Midway the Japanese gained a foothold on Attu and Kiska Islands,[5] from which they have not yet been dislodged. Moreover, on two occasions, once in February and once in June 1942, the coasts of California and Oregon, respectively, had been shelled.[6] The extent of the danger can be seen from the contem-

[5] *New York Times* for June 13, 1942, p. 1, col. 8; World Almanac for 1943.

[6] *New York Times*, June 23, 1942, p. 1, col. 4; p. 9, col. 4.

poraneous attempt of the Japanese to occupy Midway Island in June. If that attack had succeeded and Midway Island had fallen, Hawaii would have again been under the immediate threat of occupation, and peril to the West Coast itself would have mounted.

Although the effect of the Japanese attack of December 7, 1941, on the security of the continental United States for military reasons was not fully brought home to the American public at the time, the extent and the significance of the damage were revealed by the Secretary of the Navy in December 1942.[7] In explanation of the Secretary's report on the damage, it was stated that the Japanese had a naval superiority of three or four to one in the Pacific Ocean following the Pearl Harbor attack, and that the Japanese could have seized Oahu Island, on which Pearl Harbor is located, if they had realized the full extent of the inability of the United States to defend itself. The Secretary pointed out that a follow-up attack had been feared.[8] The importance to the security of the continental United States of the damage done in the at-

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[7] *New York Times* for December 6, 1942, p. 69, col. 2 (report of Secretary of the Navy Knox on the extent of the damage at Pearl Harbor); see previous statement by Secretary Knox, *New York Times* for December 16, 1941, p. 1, col. 7; p. 7, col. 2; *New York Times* for December 18, 1941, p. 2, col. 3.

[8] *New York Times* for December 6, 1942, p. 71, col. 2; p. 69, col. 3.

tack on Hawaii is underlined by the facts that the Island of Oahu constituted the largest naval base of the United States, and probably its strongest fortified area of any nature, and that it was the last stronghold of defense lying between Japan and the West Coast.[9]

Accordingly, at the time of the initiation of the evacuation program here in issue, it was the utmost military importance to prepare against an invasion of the Pacific Coast. It was incumbent to consider whether any condition existed within the West Coast area which might obstruct its successful defense in the event of an attempted invasion. There also was a danger, even in the absence of attempted invasion, of bombing raids on the West Coast, particularly in view of the American raid over Japan for which reprisal raids seemed possible.[10] Whether the success and effect of Japanese air raids might be influenced by internal conditions on the West Coast was plainly a consideration that had to be taken into account. Therefore, attention neces-

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[9] See comment by Lt. Col. Franz J. Jonitz, Quartermaster Corps Headquarters, Hawaiian Department, in the *Quartermaster Review* for May-June 1941, p. 17; A. R. Elliott, *United States Defense Outposts in the Pacific*, Foreign Policy Reports (published by the Foreign Policy Association) for March 15, 1941, particularly p. 5; F. MacLiesh and C. Reynolds, *Strategy of the Americas* (1941), pp. 67, 71; George Fielding Eliot, *The Ramparts We Watch* (1938), pp. 161, 167–169; Hanson W. Baldwin, *Our Gibraltar in the Pacific*, New York Times for February 16, 1941, sec. 7, p. 4.

[10] See statements of Secretary of War Stimson in the *New York Times* for May 15, 1942, p. 14, col. 6; for May 29, 1942, p. 1, col. 5.

sarily had to be directed to the nature of modern warfare and the disposition of the inhabitants of that area toward the war.

Fifth Column Threat.—The threat of invasion and attack inevitably created apprehension of the use by the enemy of the so-called fifth column technique of warfare. The history of modern warfare prior to December 7, 1941, had amply demonstrated that one of the most effective weapons of an invader consists of sabotage and other forms of assistance afforded by sympathizers residing within the country under attack. Citizen and alien alike have been employed to carry on this type of warfare; and the full extent of such assistance is, of course, not subject to determination until the invasion or attack has been completed or is at least well under way.[11]

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[11] See Col. William Donovan and Edgar Mowrer, *Fifth Column Lessons for America* (with introduction by Secretary of the Navy Knox) (published by the American Council on Public Affairs), pp. 6 *et seq.*; C. Porter, *Crisis in the Philippines* (1942), p. 140. See *Ex parte Liebmann* [1916], 1 K. B. 268, where it was stated (p. 278): "methods of warfare or ancillary to warfare have come into practice on the part of our foes which involve the honeycombing the realm with enemies, not only for the purpose of obtaining and dispatching information, but for purposes directly helpful to the carrying out of enterprises either actually warlike or eminently calculated to assist the successful prosecution of war." It was also stated that "the Courts are entitled to take judicial notice of certain notorious facts which may be summarized thus: There are a large number of German subjects in this country. This war is not being carried on by

West Coast War Industries.—The concentration of war facilities and installations on the West Coast made it an area of special military concern at any time and especially after the sensational Japanese successes. Important Army and Navy bases [12] and a large proportion of this nation's vital war production facilities were located in that region.

For the period from June 1940 through December 1941 contracts equalling in value approximately one-fourth of the total value of the major aircraft contracts let by the principal procurement agencies, were to be performed in the State of California. During the same period, California ranked second, and the State of Washington ranked fifth, of the States of the Union with respect to the total value of shipbuilding contracts to be performed therein. Of the total value of supply contracts of all types let by these agencies during this period, California was again in first place with about one-tenth of the total. The relative importance of California and Washington for the entire period from June 1940 to February 1943 in the combined production of aircraft and

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naval and military forces only. Reports, rumours, intrigues play a large part. Methods of communication with the enemy have been entirely altered and largely used" (pp. 274–275).

[12] See MacLiesh and Reynolds, *op. cit. supra*, pp. 66–67; Eliot, *op. cit. supra*, p. 162.

ships is approximately the same as for the earlier period.[13]

In view of such concentration of defense facilities in this region and in view of the course of the war at that time, it was of the highest order of military importance to take into account the extent and nature of the Japanese residents on the West Coast and their possible cooperation with the enemy.

B

THE JAPANESE POPULATION WITHIN THE WESTERN DEFENSE COMMAND

Approximately 112,000 persons of Japanese descent, consistituting almost ninety percent of the total number of approximately 126,000 of such persons in the United States, resided in the three West Coast states of California, Washington, and Oregon at the time of the promulgation

[13] See *State Distribution of War Supply and Facility Contracts—June 1940 through December 1941* (issued by Office of Production Management, Bureau of Research and Statistics, January 18, 1942); *State Distribution of War Supply and Facility Contracts—Cumulative through February 1943* (issued by War Production Board, Statistics Division, April 3, 1943). While complete information on the location of the individual plants is not available to the public, it has been stated that more than half of the airplane plants in the country were on or near the Pacific Coast and that many of the key aircraft plants were in Los Angeles County (See *New York Times* for February 26, 1942, p. 1, col. 3). See also C. F. McReynolds, *Condors and Humming Birds*, *Aviation* (August 1941), p. 80, as to the concentration of aircraft plants in Southern California.

of the military regulations here in issue. About two-thirds of the total number and of the number residing in these three states are native-born citizens of the United States.[14] Not only were the great majority of persons of Japanese descent within this country concentrated on the West Coast, but also they were concentrated within particular counties and cities in the three West Coast states, notably in or near Seattle, Portland, and Los Angeles.[15]

Japanese Problem on the West Coast.—Japanese immigration to this country had created special problems at least since the close of the nineteenth century when the Japanese began to come to this country in substantial numbers.[16] The intensity

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[14] See *16th Census of the United States, for 1940, Population, 2nd Series, Characteristics of Population* (Dept. of Commerce)—for California, p. 10; for Oregon, p. 10; for Washington, p. 10; Fourth Interim Report of the Select Committee Investigating National Defense Migration, House of Representatives, House Report No. 2124, 77th Cong., 2d Sess., pp. 94, 96, hereinafter called the Tolan Committee Report.

[15] See *16th Census of the United States, supra*, for California, p. 61; for Oregon, p. 50; for Washington, p. 52.

[16] See Mears, *Resident Orientals on the American Pacific Coast* (1927), pp. 19–22, 39–43, 146–147, 156, 193; P. J. Treat, *Japan and the United States* (1928), p. 275; E. K. Strong, *The Second-Generation Japanese Problem* (1934), p. 1, ch. 4, p. 149; R. D. McKenzie, *Oriental Immigration*, 11 Encyclopedia of Social Sciences (1935), 490, 492–493; Hans Kohn, *Race Conflict*, 13 Encyclopedia of Social Sciences (1935), 36, 38; R. L. Buell, *Anti-Japanese Agitation in the United States*, 37 Political Science Quarterly (1922), 605, 608, *et seq.*, 38 Pol. Science Quarterly (1923), 57, *passim;* B.

of the situation, involving their relationship to the rest of the community, has fluctuated under the stimulus of politics and some parts of the press.[17] The prevailing viewpoint towards them was expressed in state legislation prohibiting alien Japanese from owning land[18] and prohibiting inter-marriage with Caucasians,[19] and by Section 13c of the Federal Immigration Law of 1924 (c. 190, 43 Stat. 161, U. S. C., Tit. 8, Sec. 213) which, rather than allowing a quota to enter as in the case of non-Asiatics, excluded persons of the Mongolian race with limited exceptions. On the economic level, the Japanese could secure professional or skilled employment, with rare exceptions, only among others of the Japanese race and such employment opportunities were not sufficient to satisfy the number of Japanese who desired to engage in such work.[20]

Schrieke. *Alien Americans. A Study of Race Relations* (1936), pp. 24–36, 43.

[17] Mears, *op. cit. supra*, at p. 398; P. J. Treat, *op. cit. supra*, p. 281; S. L. Gulick, *The American Japanese Problem* (1914), p. 169; H. A. Millis, *The Japanese Problem in the United States* (1915), pp. 249–250; J. Pajus, *The Real Japanese California* (1937), p. 167.

[18] 1913 Cal. Stat. 206, 1 Deering Gen. Laws, Act 261; 5 Oregon Comp. Laws Ann. Sec. 61–102; Washington, Rem. Rev. Stat. Sec. 10581–10582.

[19] California Civil Code Sec. 60; 2 Idaho Code Ann Sec. 31–206; Revised Code of Montana, Sec. 5702; Arizona Code Ann. (1939), Sec. 63–107.

[20] Mears, *op. cit. supra*, p. 188 *et seq.*, particularly pp. 198–209, 402–403; Strong, *op. cit. supra*, pp. 1–11, c. 10; *Hearings Before the House Committee Investigating National Defense*

There was relatively little social intercourse between the Japanese and the white population,[21] and the Japanese were, in general, physically isolated with respect to their places of residence.[22]

The reaction of the Japanese to their lack of assimilation and to their treatment is a question which of course does not admit of any precise answer. It is entirely possible that an unknown number of the Japanese may lack to some extent a feeling of loyalty toward the United States as a result of their treatment,[23] and may feel a consequent tie to Japan, a heightened sense of racial solidarity, and a compensatory feeling of racial pride or pride in Japan's achievements.

Alienage.—An additional factor to be considered is the alienage of a substantial portion of the

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Migration, 77th Cong. 2d Sess., hereinafter called Tolan Committee Hearings, pp. 11558, 11560.

[21] Millis, *op. cit. supra*, pp. 288–289; Gulick, *op. cit. supra*, pp. 169–171; Schrieke, *op. cit. supra*, pp. 39–40.

[22] Mears, *op. cit. supra*, at pp. 341–342, 348–349; Steiner, *The Japanese Invasion* (1917), pp. 104–107, c. 8.

[23] Iyenago and Sato, *Japan and the California Problem*, pp. 167–168, 172–177; Mears, *op. cit. supra*, pp. 106, 109–110, 153–154, 342; H. B. Johnson, *Discrimination Against the Japanese in California* (1907), *passim;* Ichihashi, *Japanese in the United States*, at p. 347. Cf. Strong, *op. cit. supra*, pp. 30–31.

On the other hand, an officer of the Japanese-American Citizens League expressed the view that he had not "become bitter" or lost faith as the result of discrimination and wished to combat it exclusively by democratic methods. Tolan Committee Hearings, pp. 11138, 11196–11197. And it was stated in H. Rep. No. 1911, 77th Cong., 2d Sess., p. 20, that "most of the evacuees are loyal to this country."

Japanese who were born abroad and are therefore ineligible for citizenship. *Ozawa* v. *United States,* 260 U. S. 178. Although the alien Japanese comprised only about one-third of the Japanese on the West Coast,[24] they represented a much greater proportion of those who were likely to be an active force in the community. While over 60% of the native-born population was under the age of 20, over 95% of the foreign-born population was between the ages of 19 and 70.[25] Furthermore, approximately 24% of the alien Japanese population on the West Coast had last arrived in the United States since 1929,[26] and thus have been in Japan during the period of its emphasis on nationalism and expansion. The influence of the first, or alien, generation on the second generation must be considered in the light of the preponderance of persons of mature years among the former as compared with the latter, and also in the light of the family relationships between persons of the two generations, for filial obligation and emphasis on the family unit constitute a conspicuous phase of Japanese culture. It may be noted, however, that because of the stress of the attempt by second-

[24] See *16th Census of the United States, loc. cit. supra,* note 14.

[25] Source of computation: Bureau of Census Figures contained in Hearings before the Subcommittee of the Committee on Military Affairs of the United States Senate on S. 444. Part I, 1943, p. 65.

[26] Tolan Committee Report, p. 96.

generation Japanese to become assimilated and because of language difficulties between children and parents who have not learned to speak English fluently, parents have in many cases been unsuccessful in attempting to perpetuate the view that their children should follow their guidance, and a marked cleavage between the viewpoints and associations of the first and second generations has been observed.[27]

As to those of the first generation, the fact of their alienage would tend to cause them to have some association with the Japanese Consulate.[28] And in general, the Japanese consuls were viewed as persons of considerable prestige by the alien population, and even some of the second generation seem to have regarded them as personages of some importance.[29] The possibility of Japanese propaganda through this means, as part of its preparations for any war against this country, is obvious.

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[27] See Ichihashi, *op. cit. supra*, at p. 348; Tolan Committee Hearings, pp. 11148, 11223; Second Quarterly Report (June 1 to September 30, 1942) of the War Relocation Authority, pp. 55–58; Schrieke, *op. cit. supra*, pp. 36–39.

[28] See H. Rep. No. 1911, Preliminary Report of Select Committee Investigating National Defense Migration, House of Representatives, 77th Cong., 2d Sess., p. 17.

[29] See Miyamoto, *Social Solidarity Among the Japanese in Seattle*, 11 University of Washington Publications in the Social Sciences (December 1939), pp. 112–113; Tolan Committee Hearings, p. 11637.

Dual Nationality.—The possibility of a continuing loyalty to Japan, even on the part of the second generation is a significant consideration when viewed in the light of the provisions for dual nationality.[30] A child born in the United States of Japanese alien parents prior to December 1, 1924, automatically became entitled to and retained Japanese citizenship unless a petition of renunciation was filed on his behalf by a legal representative before his 15th birthday, or by him at any time between his 15th and 17th birthdays. Such petitions would not become effective as renunciation of Japanese citizenship, however, unless personally approved by the Japanese Minister of the Interior.[31]

On the other hand, a child of Japanese alien parentage born in the United States after December 1, 1924, could claim or qualify for Japanese citizenship only if within 14 days of birth there had been filed on his behalf with the Japanese Consulate a written statement of intention to retain Japanese nationality.[32]

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[30] Cf. Nationality Law of Japan, Article 1, Flournoy and Hudson, *Nationality Laws*, p. 382.

[31] Nationality Law of Japan, Article 20, Section 3, Regulations (Ordinance No. 26) of November 17, 1924, Flournoy and Hudson, *Nationality Laws*, pp. 385–387. See also *Foreign Relations of the United States*, 1924, Vol. 2, p. 412 (Note of Honorable Jefferson Caffrey, The Chargé in Japan to the Secretary of State); Mears, *Resident Orientals on the American Pacific Coast*, pp. 107–108.

[32] See Mears, *Resident Orientals on the American Pacific Coast*, p. 108.

No official census of the number who did so is available. The Japanese consulates in the United States, however, have issued from time to time reports of the number of American-born children of Japanese parentage who still retain their Japanese citizenship, and the number of such children who have renounced or otherwise lost their Japanese nationality. On the basis of statistics released in 1927 by the Consul General of Japan at San Francisco, it appears that over 51,000 of the approximately 63,700 American-born persons of Japanese parentage in the United States held Japanese citizenship.[33] A census of the Japanese in the United States conducted in 1930 under the auspices of the Japanese Government purported to disclose that approximately 47% of the American-born persons of Japanese parentage in California held Japanese citizenship.[34]

An important aspect of dual citizenship was that the Japanese Government regarded all Japanese citizens as liable to military conscription and required them to apply for out-of-Empire deferment in order to avoid it.[35]

Shintoism.—Another factor to be taken into account in considering the viewpoints and loyalties

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[33] See Mears, *op. cit. supra*, p. 429.

[34] See Strong, *op. cit. supra*, p. 142.

[35] See, *e. g.*, military conscription notice appearing in *Rafu Shimpo* (Los Angeles Japanese language daily newspaper), October 11, 1941.

of the West Coast Japanese is the existence and nature of Shintoism. It seems to be accepted that the basic doctrine of Shinto is the apotheosis of, and reverence for, the Japanese Imperial Family, and that the Japanese Government has, since at least the middle of the 19th century, made it a primary function of government to spread belief in Shinto throughout Japan.[36] As an amplification of the doctrine of the divinity of the Emperor, an attempt has been made in Japan to identify the extension of Japanese rule or influence as a sacred purpose.[37]

While the force of Shinto in Japan as a source of stimulation for patriotism and loyalty to the

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[36] See Yamashita, Yoshitaro (formerly chancellor, Imperial Japanese Consulate, London), *The Influence of Shinto and Buddhism in Japan*, Transactions and Proceedings of the Japan Society of London, Vol. 14, p. 257, quoted in D. C. Holtom, *The National Faith of Japan* (1938), pp. 4–5; *Japan, Religion*, 15 Encyclopedia Brittanica (11th Ed., 1911), p. 222; *Japan, Religion*, 12 Encyclopedia Brittanica (14th Ed., 1936), pp. 926–927; *Shintoism*, 20 Encyclopedia Brittanica (14th Ed., 1936), p. 504; M. Anesaki, *Shinto*, 14 Encyclopedia of Social Sciences (1935), p. 24; A. M. Young, *Rise of a Pagan State* (1939), ch. 6; A. M. Underwood, *Shintoism* (1934), ch. 9; D. C. Holtom, *The Political Philosophy of Modern Shinto: A Study of the State Religion of Japan*, 49 Transactions of the Asiatic Society of Japan, Part II (1922), pp. 299–301; D. C. Holton, *Modern Japan and Shinto Nationalism* (1943), ch. 1, 2, and 3. For complete accuracy this form of Shinto is frequently termed State Shinto, since sects exist which emphasize reverence of others than the Emperor.

[37] See D. C. Holtom, *The National Faith of Japan* (1938), p. 289; Otto D. Tolischus, *Tokyo Record* (1934), pp. 13–16.

Japanese Emperor cannot be doubted, the prevalence of Shintoism among the West Coast Japanese is a difficult factor to evaluate. For one thing, religious surveys do not show the number of its adherents since belief in Shintoism together with simultaneous belief in another religion is possible and common, and also because the Japanese Government has frequently maintained that Shintoism could not properly be classed as a religion.[38] However, there can be no doubt that at least those Japanese who were at any time in Japan were exposed to Shinto indoctrination. And it has been stated that there was an increase in Shintoism on the West Coast in recent years.[39]

While Shinto doctrine was not originally a part of the Buddhist religion, Buddhism in Japan has

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[38] See Holtom, *The National Faith of Japan* (1938), p. 290, *et seq.*

[39] See Schrieke, *op. cit. supra*, p. 41.

While it is true that a 1936 census listed only one Shintoist Temple in Los Angeles (see 1 Religious Bodies, 1936, Department of Commerce, Bureau of Census, 1941, p. 7), there were in 1941, according to directories published by the West Coast Japanese language papers, 28 Shinto shrines in California, 2 in Washington, and 2 in Oregon. (The New World Sun Year-Book for 1941, pp 122, 112, 517, 319, 371, 279, 393, 190, 90, 497, 209, 612, 17, 492, 282, 629, 591; Japanese-American Directory (Nichibei Jusho Roku) for 1941, pp. 77, 82, 530, 268, 503, 232, 307, 156, 56, 177, 2, 429, 236, 549, 579). Some of these shrines, however, may have been devoted to the practice of sects of Shinto other than State Shinto. As to the number of shrines in Los Angeles, see also Japanese Telephone & Business Directory of Southern California, No. 29.

accommodated itself to, and has aided in the indoctrination of State Shinto."[40] On the West Coast a substantial number of Japanese were Buddhists,[41] and it has been stated that some of the Buddhist priests in the West Coast communities also attempted to indoctrinate their congregations with Japanese nationalism.[42]

Education of American-born children in Japan.—It has been estimated by the Tolan Committee that approximately 10,000 American-born children of Japanese parents had been sent to

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[40] D. C. Holtom, *Modern Japan and Shinto Nationalism* (1943), pp. 124, 148–151. Compare Sir Charles Eliot, *Japanese Buddhism* (1935), pp. 179–196.

[41] According to the 1936 survey, there were 65 Japanese clergymen, together with two deans and one bishop, connected with the Buddhist Mission of North America on the West Coast. The Mission had 31 churches in the three West Coast states, with 12,718 members, out of a total of 35 churches with 14,388 members in the United States as a whole. In connection with the Buddhist churches, some Japanese Language Schools of a religious nature were maintained (2 *Religious Bodies*, 1936, Department of Commerce, Bureau of Census, 1941, pp. 341–346).

[42] See Millis, *op. cit. supra*, pp. 267–268. Thus, a Buddhist priest at a dedication ceremony of a new Temple, was reported in the Los Angeles Japanese language daily, Rafu Shimpo, for November 22, 1940, as suggesting to his audience that "We are the race of Yamato which has received and carried on the flesh and blood of our ancestors over a period of 2,600 years. Therefore, there is no necessity for us to give up our spirit to the United States merely because we have received a little education."

Japan for part or all of their education. See H. Rep. No. 1911, 77th Cong., 2d Sess., p. 16.[43] Although some of them have doubtless become antagonistic towards the Japanese Government as a result of their visits,[44] this group of 10,000 is nevertheless regarded as containing some of the most dangerous elements in the Japanese community. H. Rep. No. 1911, *supra*. Youths thus educated in Japan are essentially and culturally[45] Japanese, and it is probable that many of them are intensely loyal to Japan.[46] It is reasonable to assume that such students were inculcated with Japanese nationalistic philosophy and were exposed to the religious training which identifies the Emperor as a deity.[47]

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[43] The foregoing report estimates that there are about 60,000 American-born Japanese who had not been sent to Japan. These estimates should be compared with a survey conducted by the San Francisco Chapter of The Japanese American Citizens League in October 1940 which disclosed that 22.8% of the second generation were American-born and had been to Japan. See Tolan Committee Hearings, p. 11151. See also *id.*, pp. 11199–11200.

[44] See Tolan Committee Hearings, pp. 11220–11229.

[45] Ichihashi, *op. cit. supra*, pp. 319–320.

[46] *The Japanese in America*, Harpers Magazine (October 1942), pp. 489, 491, 492.

[47] See Holtom, *Modern Japan and Shinto Nationalism* (1942), pp. 6–7, 26, which indicates that religious training is an integral part of the Japanese educational program. Not only does such education stress the national character of Japan, but it focuses upon the divinity of the Imperial Family. See Holtom, *The National Faith of Japan* (1938), pp. 79–85, 125, 131–138.

Japanese Language Schools on the West Coast.—A further potential influence on the Japanese on the West Coast were the Japanese language schools. It has been stated that there were 248 such schools with 19,000 pupils in Southern California at the outbreak of the war,[48] that there were 14 schools in Oregon and 9 in Seattle, Washington.[49] The sessions at these schools were held outside the regular hours of the public schools.[50]

Although it has been suggested that the children were sent to these schools so that they might more easily converse with their parents[51] and because of increased employment opportunities in Japanese firms,[52] it nevertheless appears likely that the schools may have afforded a convenient medium for indoctrinating the pupils with Japanese nationalistic philosophy. There is evidence that the textbooks used at these schools were printed in Japan,[53] and that the Japanese

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[48] Statement in the *Los Angeles Times* of January 23, 1942, quoted in Report on Japanese Activities, Appendix 6 to Hearings before a Committee on Un-American Activities, House of Representatives, 77th Cong., 1st Sess., p. 1894.

[49] Tolan Committee Hearings, pp. 11393, 11394; see also pp. 11348, 11338, 11702.

[50] See Mears, *op. cit. supra*, p. 358; Tolan Committee Hearings, pp. 11145, 11223.

[51] See Tolan Committee Hearings, p. 11,145.

[52] See Mears, *op. cit. supra*, p. 358; Strong, *op. cit. supra*, at p. 203; Tolan Committee Hearings, pp. 11144–11145, 11222–11223.

[53] See *Los Angeles Times*, cited in footnote 48, *supra*.

Government assisted the schools both financially and by sending teachers from Japan.[54]

Japanese Organizations.—There is evidence that the Japanese in this country were highly organized, and that many of the local associations were part of an integrated structure dominated by The Japanese Association of America which had been organized under the guidance of the Japanese Consulate.[55] Moreover, there were numerous other Japanese organizations which maintained close ties with Japan.[56] Whatever may be the full significance of these organizations, it is apparent that they probably tended to stimulate cohesiveness and social solidarity of the Japanese community and that they offered the Japanese Consulate a means at least for the dissemination of propaganda.

Possibility of Civil Disorder.—Finally, a consideration that cannot be ignored in viewing the

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[54] See *Un-American Activities in California* (Report to California legislature 1943), pp. 327–328. Cf. Tolan Committee Hearings, p. 11637.

[55] See Tolan Committee Hearings, p. 10975, *et seq.;* Beikoku Chuo Nihonjin Shi (History of the Central Japanese Association of America) edited by Shiro Fujioka (published in Tokyo in 1940), pp. 15, 170, 171, 175, 191, 303–304; cf. Mears, *op. cit. supra*, p. 342.

[56] For example, Heimusha Kai, The Society of Men Eligible For Military Duty, was listed as having 15 branches in California by The New World Sun Year-Book for 1941. As to its activities and relationship to Japan, see *Zaibei Nihonjin Shi* (History of Japanese Residents in the United States published by Zaibei Nihonjin Kai (Japanese Association of America) in Tokyo, 1940, p. 672.

situation at the time the exclusion program was carried out was the possibility of civil disorder arising from local violence against the Japanese. There was substantial reason to believe that the likelihood of such physical violence was more than a mere theoretical possibility, and that protective measures were necessary.[57]

SUMMARY OF ARGUMENT

I

The evacuation and curfew measures were authorized by the Act of March 21, 1942. That statute was enacted for the express purpose of implementing Executive Order No. 9066, which had been promulgated on February 19, 1942, and the evacuation and curfew measures adopted under that Order were plainly within its contemplation.

II

The Act of March 21, 1942, was a valid exercise of the war powers and is constitutional as applied here. This case does not involve any question of martial law. There has been no suspension of the privilege of the writ of habeas corpus, and the civil courts have not been superseded by military tribunals. This case does not present any of the large issues discussed in *Ex parte Milligan*, 4 Wall. 2.

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[57] See Tolan Committee Report No. 2124, pp. 145–147, 149–150; Tolan Committee Hearings, p. 11156.

The central question is whether there is support in the Constitution for the statute as applied. Article I grants comprehensive powers to the Congress, and Article II independently confers sweeping authority directly upon the President as Commander in Chief. The Joint Resolution of December 8, 1941, declared a state of war between the United States and Japan, and directed the President to employ the entire naval and military forces of the country and the resources of the Government to prosecute the war.

The Act of March 21, 1942 was amply warranted in the circumstances. The extent of the disaster at Pearl Harbor, only recently revealed to the public, left the West Coast exposed to destructive enemy attack. The Japanese, during the winter of 1942, were at the crest of their military fortunes, and were making bold and impressive strides in many theaters of war. The condition of our temporarily crippled Pacific fleet and the course of the war at that time rendered it imperative that those charged with the defense of our shores take adequate protective measures against a possible invasion of the West Coast.

The great majority of persons of Japanese ancestry in this country were concentrated on the West Coast. About one third of them were aliens, and the majority of the American-born were in the younger age groups. A significant number of the American-born had been sent to Japan for

their education, and many of them were regarded, by reason of their training abroad, as highly dangerous. The fact that the so-called fifth column type of warfare had been so apparently successful in recent years, and the fact that there had been evidence of extensive espionage at Pearl Harbor, made it imperative to take adequate precautionary steps.

Although it may be assumed that the majority of the Japanese residents on the West Coast were loyal to the United States, the very presence of the entire group presented grave danger because that group comprehended an unknown number of unidentified persons who constituted a serious threat. Prompt and decisive action was necessary, and it cannot be said that it was unreasonable to determine to exclude the Japanese as a whole from these vital areas, and to adopt such supplementary measures as the curfew.

The action thus taken did not result in any denial of due process. The exercise of governmental power generally interferes with one's liberty to a greater or lesser degree, and the only question is whether that interference is wholly unreasonable or arbitrary.

The exigencies of war may demand the imposition of restraints that would be unwarranted in times of peace. Indeed, an individual may be required to give up his freedom and lay down his life.

Selective Draft Law Cases, 245 U. S. 366. The curfew and exclusion measures herein are certainly less drastic than compulsory military service.

Nor is there any absence of due process in that all the Japanese have been evacuated as a group. The classification was not based upon invidious race discrimination. Rather, it was founded upon the fact that the group as a whole contained an unknown number of persons who could not readily be singled out and who were a threat to the security of the nation; and in order to impose effective restraints upon them it was necessary not only to deal with the entire group, but to deal with it at once. Certainly, it cannot be said that such a conclusion was beyond the honest judgment, reasonably exercised, of those whose duty it was to protect the Pacific Coast against attack.

The Act of March 21, 1942, does not involve any unconstitutional delegation of legislative power. To the extent that it constitutes a ratification of the previously issued Executive Order No. 9066, there is no delegation whatever. And to the extent that the curfew and exclusion measures were thereafter adopted, they were well within the scope of the statute, as construed in the light of its history. Moreover, as in the field of foreign relations, the war power admits of far wider latitude of authority delegable to the executive branch than is permissible in the case of ordinary

domestic affairs. Cf. *United States* v. *Curtis-Wright Corp.*, 299 U. S. 304.

III

This case does not properly involve any question as to the validity of any subsequent detention of the Japanese as a group which followed evacuation. It is important to bear in mind precisely what occurred in the execution of the evacuation program.

In order to assure the effectiveness of the evacuation, the Japanese were temporarily placed under restraint at nearby so-called Assembly Centers. At the time the orders herein were issued there was no provision whatever for detention at the Relocation Centers to which they were subsequently transferred. Moreover, this defendant was not sent to any Relocation Center. Upon being admitted to bail after conviction, he was permitted to leave the military area, and to proceed inland for the purpose of accepting employment. Furthermore, the regulations adopted for the Relocation Centers provide for leave where there is opportunity for employment and residence of the individual at his proposed destination and where such leave is consistent with the public safety, etc. Thus, even if the defendant had been sent to a Relocation Center, there is no reason to believe that he could not have qualified for such leave, and he therefore has no standing to com-

plain of the detention of others who are presently at such centers.

ARGUMENT

I

THE EVACUATION AND CURFEW MEASURES WERE AUTHORIZED BY THE ACT OF MARCH 21, 1942

The defendant did not contend in the court below that the curfew and evacuation orders of General DeWitt, which he violated, were outside the scope of the authority delegated by the President in Executive Order 9066, and by Congress in the Act of March 21, 1942. He rested his case on the contention that the Executive Order, the statute and the action taken thereunder were unconstitutional. Nevertheless, it will be helpful to review the history of the curfew and evacuation orders, for the purpose of showing that they were properly authorized.

On February 20, 1942, the Secretary of War designated General DeWitt as the military commander authorized to carry out the duties imposed by Executive Order 9066 within the area encompassed in the Western Defense Command, which had been established on December 11, 1941. See Public Proclamations Nos. 1 and 2. See Appendix D, *infra*, pp. 97–124. See also record in *Yasui* v. *United States*, No. 871, pp. 62–63. Acting under the provision of Executive Order 9066, empowering a military commander duly designated

by the Secretary of War "to prescribe military areas in such places and of such extent as he * * * may determine," General DeWitt issued Public Proclamation No. 1, which established as a military area the region in which the defendant resided.

General DeWitt's subsequent orders excluding persons of Japanese ancestry from this area were unquestionably authorized by the provision of Executive Order 9066 that "any or all persons may be excluded" from the duly prescribed areas, as well as by the provision that in all such areas "the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion." It is equally clear that the curfew order with respect to the duty of specified classes of persons in the military area to remain within their homes during specified hours was within General DeWitt's power to impose restrictions on the "right of any person to enter, remain in, or leave" the area and thus was in the discretionary power delegated by Executive Order 9066.[34]

[34] While the fact that General DeWitt's orders are within the scope of the terms of Executive Order 9066 is sufficient authorization, it may be noted also that the Executive Order followed closely, both in time and content, the recommendations by members of Congress that military authority be used to execute the evacuation of persons of Japanese ancestry from the Pacific Coast states. Tolan Committee Preliminary Report (H. Rep. No. 1911, 77th Cong., 2d Sess.), pp. 3–5.

Congressional authority for the promulgation of the curfew and evacuation orders is clear. The very purpose of the Act of March 21, 1942, was to confirm and implement Executive Order No. 9066. The bill which became the Act of March 21, 1942, was introduced in the Senate on March 9, 1942, and in the House on March 10, 1942, at the request of the Secretary of War, who stated explicitly that the purpose of the legislation was to provide a means for enforcement of orders issued under Executive Order 9066.[52] Representative Costello for the House Military Affairs Committee made plain the legislative understanding that curfew restrictions and the removal of persons, citizens as well as aliens, from military areas were

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[52] Identical letters from the Secretary of War to the Speaker of the House and to the Chairman of the Senate Committee on Military Affairs stated (Cong. Rec., Vol. 88, part 2, p. 2722; H. Rep. No. 1906, 77th Cong., 2d Sess., p. 2):

"The purpose of the proposed legislation is to provide for enforcement in the Federal criminal courts of orders issued under the authority of the Executive order of the President No. 9066, dated February 19, 1942. This Executive order authorizes the Secretary of War to prescribe military areas from which any and all persons may be excluded for purposes of national defense."

The Secretary of War wrote to the Chairman of the Senate and House Committee on Military Affairs in identical letters dated March 13 and 14, 1942, respectively, as follows (Cong. Rec., Vol. 88, part 2, p. 2725; H. Rep. No. 1906, p. 3) that "the bill, when enacted, should be broad enough to enable the Secretary of War or the appropriate military commander to enforce curfews and other restrictions within military areas and zones."

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contemplated.[60] When the bill was discussed in the Senate, Senator Reynolds, Chairman of the Senate Military Affairs Committee, read a newspaper item stating that "evacuation of the first Japanese aliens and American-born Japanese from military area No. 1" was about to commence; described the proposed evacuation; read to the Senate the Report of the Committee on Military Affairs, which included the letters of the Secretary of War, referred to in footnote 59, *supra;* read General DeWitt's Public Proclamation No. 1; and stated the common understanding of the bill.[61]

On the House Floor when the bill was being considered for enactment, its immediate passage

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[60] "The necessity for this legislation arose from the fact that the safe conduct of the war requires the fullest possible protection against either espionage or sabotage to national defense material, national defense premises, and national defense utilities. In order to provide such protection it has been deemed advisable to remove certain aliens as well as citizens from areas in which war production is located and where military activities are being conducted. To make such removal effective, it is necessary to provide for penalties in the event of any violation of the orders or restrictions which may be established, as well as to enforce curfews, where they may be required" (H. Rep. No. 1906, 77th Cong., 2d Sess., p. 2).

[61] "It is my understanding that in order to carry out the objectives of the Proclamation, and thus keep clear the military areas which have been defined by General DeWitt, the commander of the western area, we are asked to provide the department with authority to keep certain individuals from entering or leaving military zones, or not complying with any of the curfew laws, or any regulations which might be established within those zones" (Cong. Rec., Vol. 88, part 2, pp. 2722–2726).

was urged on the basis that "evacuation is taking place now" (Cong. Rec., Vol. 88, part 2, p. 2730).

At the time the bill was approved by the President and became law on March 21, 1942, General DeWitt had already issued Proclamation No. 1 of March 2, 1942, designating certain military areas and military zones, and providing that such classes of persons as the situation may require would by subsequent proclamation be excluded from the areas and zones. Proclamation No. 2 of March 16, 1942, designating additional military areas and zones, repeated the provision that such classes of persons as the situation might require would by subsequent proclamation be excluded from zones within the military areas, and provided that German and Italian aliens, and persons of Japanese ancestry residing in the Western Defense Command who changed their places of habitual residence were required to obtain and execute change-of-residence notices.

Immediately subsequent to March 21, 1942, Proclamation No. 3, issued on March 24, 1942, provided the curfew for Germans and Italian aliens, and all persons of Japanese ancestry, and announced that exclusion orders would thereafter be issued. Proclamation No. 4 of March 27, 1942, prohibited further voluntary evacuation of Japanese persons from Military Area No. 1. On May 10, Civil Exclusion Order No. 57, involved in this case, was issued.

It is submitted that the Act of March 21, 1942, constituted not only clear authorization of the action taken, but also a plain legislative ratification of Executive Order 9066, and of the orders issued thereunder. *Swayne & Hoyt, Ltd.* v. *United States,* 300 U. S. 297, 300-303; *Silas Mason Co.* v. *Tax Comm'n,* 302 U. S. 186, 208; *Isbrandtsen-Moller Co.* v. *United States,* 300 U. S. 139, 146–148; *Tiaco* v. *Forbes,* 228 U. S. 549, 556; *United States* v. *Heinszen & Co.,* 206 U. S. 370, 382, 384; *Prize Cases,* 2 Black 635, 671. Cf. *Standard Oil Co.* v. *Johnson,* 316 U. S. 481, 484. Moreover, the Congressional authorization is further confirmed by the $70,000,000 appropriation made by the Act of July 25, 1942, for the War Relocation Authority, in connection with the evacuation program. Public Law No. 678, 77th Cong., 2d Sess., c. 524, 56 Stat. 704. Such appropriation acts are a familiar form of expression of Congressional understanding and approval. *Brooks* v. *Dewar,* 313 U. S. 354, 360–361; *Isbrandtsen-Moller Co.* v. *United States, supra,* at page 147.

II

THE ACT OF MARCH 21, 1942, WAS A VALID EXERCISE OF THE WAR POWERS AND IS CONSTITUTIONAL AS APPLIED HERE

1. *This case does not present any question of martial law.*—It is important at the outset to bring the constitutional issue into proper focus.

This case does not involve any question of martial law as that term is commonly understood. There has been no suspension of the privilege of the writ of habeas corpus, and the civil courts have not been superseded by military tribunals. Indeed, this very case commenced as a prosecution in a United States District Court. The question is not whether the defendant may be tried by a military tribunal (cf. ***Ex parte Quirin,*** 317 U. S. 1). There is not here involved any of the large issues discussed in ***Ex parte Milligan,*** 4 Wall. 2, and considered by the District Court in *Yasui* v. ***United States,*** No. 871. Nor is it necessary to determine whether the principles enunciated by the majority in the ***Milligan*** case should be reexamined.[62]

The defendant was charged with violating an act of Congress. The law that is here being enforced was enacted by the legislature, and to the extent that there has been any delegation to the executive branch of the Government, the problem in this respect does not differ from that presented in ***McKinley*** v. ***United States,*** 249 U. S. 397. If the delegation is a valid one, as we contend that it is

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[62] Those principles, once accepted in Great Britain (see Fairman, *The Law of Martial Rule and the National Emergency* (1942), 55 Harv. L. Rev. 1253, 1254), have not been followed in some of the more recent cases in the English and Irish courts. Cf. *Ex parte Marais*, [1902] A. C. 109; *The King* v. *Allen*, [1921] 2 Ir. R. 241; *The King* (*Garde*) v. *Strickland*, [1921] 2 Ir. R. 317; *The King* (*Ronayne and Mulcahy*) v. *Strickland* [1921], 2 Ir. R. 333. See Carr, *A Regulated Liberty* (1942), 42 Col. L. Rev. 339.

(*infra*, pp. 65–70), then the only question is whether there is support in the Constitution for the statute as applied.

We contend that the war powers in the Constitution furnish ample authority for the evacuation and curfew measures[63] adopted under the Act of March 21, 1942, and that those measures were not framed in such manner as to be violative of the requirements of due process.

2. *The scope of the war powers under the Constitution.*—The war powers are not concentrated in any one clause in the Constitution. They consist of the aggregate of many powers, set forth in full in Appendix A, *infra*, pp. 83–85. Not only are comprehensive powers delegated to Congress by

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[63] The indictment herein was in two counts, the first charging the defendant with failing to report to the Civil Control Station on May 11 or May 12, 1942, as required by Civil Exclusion Order No. 57, in connection with the evacuation which was to take place pursuant to that order on May 16, 1942 (R. 1–2). It is assumed that the defendant may raise the validity of the evacuation measure, since the requirement that he report at the Civil Control Station was merely ancillary to evacuation. The second count charged violation of the curfew provision of Public Proclamation No. 3 (R. 2–3). The defendant was found guilty upon both counts, but the three-month sentences which he was given on each count were to run concurrently (R. 24). Accordingly, if the conviction was proper on either count, it would be unnecessary to consider the other count. Cf. *Pierce* v. *United States*, 252 U. S. 239, 252–253; *Brooks* v. *United States*, 267 U. S. 432, 441; *Abrams* v. *United States*, 250 U. S. 616, 619; *Evans* v. *United States*, 153 U. S. 608, 609; *Claassen* v. *United States*, 142 U. S. 140, 146; *Doe* v. *United States*, 253 Fed. 903, 904 (C. C. A. 8).

Article I, but, in addition, Article II confers most sweeping authority directly upon the President.

(a) Pursuant to its power under Article I, Congress adopted on December 8, 1941, and the President approved a joint resolution, declaring a state of war between the United States and the Imperial Government of Japan. See Appendix B, *infra*, p. 86. The resolution directed the President to employ the entire naval and military forces of the United States and the resources of the Government to prosecute the war; and it pledged all the resources of the country to bring the conflict to a successful termination.

The events which had occurred between the attack on Pearl Harbor and the enactment of the Act of March 21, 1942, amply warranted such legislation. The extent of the disaster at Pearl Harbor, only recently disclosed to the public, was all too well known to the military authorities, and left the military and naval installations, shipyards, airplane and other war manufacturing plants on the West Coast exposed to destructive enemy attack. It was learned that Japanese espionage had supplied the Japanese forces with precise information as to the disposition of the vessels of the fleet at Pearl Harbor, the nature and location of anti-aircraft defenses and the time and course of flight of air patrols.[44] On December

[44] Report dated January 23, 1942, of the Commission Appointed by The President Of The United States To Investigate And Report The Facts Relating To The Attack Made

11, 1941, the Western Defense Command had been established and designated a theatre of operations; the commanding general was charged with the duty, *inter alia,* of protecting that area against enemy attack. The overwhelming majority of persons of Japanese ancestry in the United States resided on the West Coast. See *supra,* p. 18. Great apprehension was felt that even if the majority of those Japanese were loyal to the United States, a number of them, citizens and aliens alike, might be disposed to assist the enemy, particularly in the case of an attack. And there was also concern lest the resident Japanese be subjected to mass local violence in the event of an attack.[65] These circumstances and the imperative need for prompt protective action were fully known to the President when he issued Executive Order No. 9066, which was to form the basis for the curfew and evacuation regulations. And both the House and the Senate were informed of the grave dangers inherent in permitting the Japanese to remain in the numerous critical areas along the West Coast, and of the peril to the nation that might result from the treacherous action of some of those Japanese.

By Japanese Armed Forces Upon Pearl Harbor In The Territory Of Hawaii On December 7, 1941 (The Roberts' Committee Report), pp. 12–13, Senate Document No. 159, 77th Congress, 2nd Sess.

[65] See Tolan Committee Report, pp. 145–147, 149–150; Hearings, pp. 11044, 11156.

See Cong. Rec., Vol. 88, part 2, pp. 2722–2726, 2729–2730.

It is in the light of these circumstances that the validity of the Act of March 21, 1942 and the related orders must be examined under the war powers. The plenary character of the power to wage war and its extension to every matter relating to the carrying on of war have been repeatedly emphasized. As former Chief Justice Hughes remarked during the first World War, "The power to wage war is the power to wage war successfully." (Hughes, *War Powers under the Constitution,* 42 A. B. A. Rep. 232, 238.) And in *United States* v. *Macintosh,* 283 U. S. 605, this Court indicated the extraordinary breadth of the war power as follows (pp. 622–623):

> From its very nature, the war power, when necessity calls for its exercise, tolerates no qualifications or limitations, unless found in the Constitution or in applicable principles of international law. In the words of John Quincy Adams,—"This power is tremendous; it is strictly constitutional; but it breaks down every barrier so anxiously erected for the protection of liberty, property and of life." To the end that war may not result in defeat, freedom of speech may, by act of Congress, be curtailed or denied so that the morale of the people and the spirit of the army may not be broken by seditious utterances; freedom of the press curtailed to preserve

> our military plans and movements from the knowledge of the enemy; deserters and spies put to death without indictment or trial by jury: ships and supplies requisitioned; property of alien enemies, theretofore under the protection of the Constitution, seized without process and converted to the public use without compensation and without due process of law in the ordinary sense of that term; prices of food and other necessities of life fixed or regulated; railways taken over and operated by the government; and other drastic powers, wholly inadmissible in time of peace, exercised to meet the emergencies of war.
>
> These are but illustrations of the breadth of the power; * * *

Moreover, as noted in *Stewart* v. *Kahn,* 11 Wall. 493, upholding the power of Congress to toll state statutes of limitations during and after the Civil War (p. 507):

> * * * the power is not limited to victories in the field and the dispersion of the insurgent forces. It carries with it inherently the power to guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its rise and progress. * * *

See also *Ashwander* v. *Valley Authority,* 297 U. S. 288, 326; *Home Bldg. & L. Assn.* v. *Blaisdell,* 290 U. S. 398, 426, 447–448; *Hamilton* v. *Kentucky Distilleries Co.,* 251 U. S. 146, 161; *McKinley* v. *United States,* 249 U. S. 397; *Schenck*

v. *United States*, 249 U. S. 47; *Selective Draft Law Cases*, 245 U. S. 366; *Raymond* v. *Thomas*, 91 U. S. 712, 714–715; *Miller* v. *United States*, 11 *Wall.* 268.

Thus, under the war powers, this Court has sustained the compulsory draft of persons to serve in the armed forces (*Selective Draft Law Cases, supra*); suppression of prostitution in military areas (*McKinley* v. *United States*, 249 U. S. 397); prohibition of the sale of liquor even after hostilities had ceased (*Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146; *Jacob Ruppert* v. *Caffey*, 251 U. S. 264); Government operation of the railroads (*Northern Pac. Ry. Co.* v. *North Dakota*, 250 U. S. 135); Government operation of systems of communications (*Dakota Cent. Tel. Co.* v. *South Dakota*, 250 U. S. 163); and regulation of maximum prices (*Highland* v. *Russell Car Co.*, 279 U. S. 253).[66]

The evacuation and related curfew measures herein plainly constituted an exercise of the war powers, and indeed were more directly concerned

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[66] *United States* v. *Cohen Grocery Co.*, 255 U. S. 81, relied upon by petitioner in the court below as indicating a more restricted view of the war powers, is plainly distinguishable. The Court there held invalid certain provisions of the Lever Act because they did not establish a sufficiently ascertainable standard of guilt. That decision certainly can have no application here, for, under the Act of March 21, 1942, the prosecution must show that the accused "knew or should have known of the existence and extent of the restrictions or order and that his act was in violation thereof." Cf. *Gorin* v. *United States*, 312 U. S. 19, 27–28.

with the actual conduct of the war than many of *the measures which have been sustained* in the foregoing decisions. Evacuation of persons from critical areas is a familiar exercise of war power and constitutes recognized military strategy both here and abroad. *Lockington's Case,* Brightly N. P. (Pa.) 269; *Lockington* v. *Smith,* 1 Pet. C. C. 466, 15 Fed. Cas. p. 758, No. 8448 (C. C. Pa.) (requiring alien enemies to evacuate to 40 miles beyond Atlantic tidewater); *Ronnfeldt* v. *Phillips* (K. B. 1918) 35 T. L. R. 46 (evacuation of an individual from a military area); *Emergency Powers (Defense) Act,* 1939 (2 & 3 George VI., c. 62); War Measures Act (c. 206, Rev. Stat. Canada 1927).[87] Cf. *Respublica* v. *Sparhawk,* 1

[87] Under the English Act which authorizes regulations necessary for securing the public safety and the efficient prosecution of the war, the British Government provided by the Defense (General) Regulations, 1939, Part 2, Section 21 (S. R. & O., 1939, No. 927, as amended, 32 Halsbury's Statutes of England, pp. 1294–1295):

"(1) A Secretary of State or the Admiralty, * * * may, if it appears to him or them to be necessary or expedient so to do for the purpose of meeting any actual or apprehended attack by an enemy or of protecting persons and property from the dangers involved in any such attack, make, as respects any area in the United Kingdom * * *—

"(a) an order directing that after such time as may be specified in the order, no person other than a person of such a class as may be so specified shall be in that area without the permission of such authority or person as may be so specified;

* * * * *

"(2) An order made under paragraph (1) of this Regulation for the removal of persons or property from any area—

Dall. 357 (removal of goods to prevent seizure by the enemy). Indeed, under the recent British legislation, it has been held that a British subject may be arrested and detained in prison merely because the Home Secretary "had reason to believe" that he was a person of "hostile origin or associations". *Liversidge* v. *Anderson,* [1942] A. C. 206; *Greene* v. *Secretary of State for Home Affairs,* [1942] A. C. 284.

(b) In considering the evacuation and curfew measures above, we directed our discussion to-

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"(a) may prescribe the routes by which persons or property, or any particular classes of persons or property, are to leave or be removed from the area;

"(b) may prescribe different times as the times by or at which different classes of persons or property in the area are to leave or be removed therefrom:

"(c) may prescribe the places to which persons are to proceed on leaving that area in compliance with the order;

"(d) may make different provision in relation to different parts of the area; and may contain such other incidental and supplementary provisions as appear to the authority or person making the order to be necessary or expedient for the purposes of the order."

The Defence of Canada Regulations are similar to the quoted English regulations and the Order of the Minister of Justice of August 18, 1942, under the Regulations (Canada Gazette, Extra No. 96, August 31, 1942) provided for a specific protected area in the Province of British Columbia along the Pacific Coast similar to our military areas, and stated in part as follows:

"9. Every person of the Japanese race shall leave the protected area aforesaid forthwith.

"10. No person of Japanese race shall enter such protected area except under permit issued by the Royal Canadian Mounted Police."

wards establishing the validity of the Act of March 21, 1942, under which those measures were taken. But even if that statute had not been enacted the President had ample power under the Constitution to authorize such measures without supporting legislation.

During the Civil War, President Lincoln, in the absence of congressional action, dealt with an unprecedented national emergency by his Proclamations of April 15, 1861 (12 Stat. 1258), announcing the rebellion and calling for volunteers, and of April 19, 1861 (12 Stat. 1258), announcing the blockade of the ports of the southern states by naval forces and providing that any vessel running the blockade might be condemned as prize. In the *Prize Cases*, 2 Black 635, this Court sustained the legality of the President's exercise of the executive war power to provide a blockade and stated (p. 670):

> Whether the President in fulfilling his duties, as Commander-in-chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided *by him*, and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted. "He must determine what degree of force the crisis demands."

> The proclamation of blockade is itself official and conclusive evidence to the Court that a state of war existed which demanded and authorized a recourse to such a measure, under the circumstances peculiar to the case. [Italics by the Court.] [48]

It is submitted that if, as in the *Prize Cases,* prior to a declaration of war the executive war power could be constitutionally exercised against loyal citizens solely on the basis of their residence in the states where the rebellion was active, but in which they had no part, and could designate them as enemies and subject their property to forfeiture as prize, *a fortiori* after the declaration of war of December 8, 1941, directing him to use all resources of the government (55 Stat. 795, 77th Cong., 1st Sess., c. 561), the unprecedented emergency which faced the Chief Executive in this case could be dealt with constitutionally by the exercise of the executive war power to evacuate all persons of Japanese ancestry from the most crucial area in the country and to place them under a curfew as a restriction supplemental to the evacuation. See Corwin, *The President, Office and Powers* (1940), p. 158 *et seq.;* Randall, *Constitutional Problems Under*

[48] Lincoln's action had been thereafter approved by Congress, and the Court stated (p. 671) that even if his action were illegal, the congressional ratification operated to cure the defect.

Lincoln (1926), pp. 29 *et seq.*, 514 *et seq.*; Berdahl, *War Powers of the Executive in the United States* (1921), pp. 182, *et seq.*; Taft, *The Presidency* (1916), pp. 85, *et seq.*; 2 Story, *Commentaries on the Constitution*, pp. 327, *et seq.* (5th Ed. 1891).

Moreover, apart from the war power committed to the President by the Constitution, the measures herein could be sustained under Article II, Section 3 which provides that the President "shall take Care that the Laws shall be faithfully executed * * *." In *In re Neagle*, 135 U. S. 1, this Court ruled that a Federal marshal could not be detained by state authorities upon a charge of murder for killing an individual who had attempted to attack Mr. Justice Field. In commenting upon the sweep of executive authority, this Court stated (pp. 63–64, 67):

> If we turn to the executive department of the government, we find a very different condition of affairs [from that in the legislative department]. The Constitution, section 3, Article 2, declares that the President "shall take care that the laws be faithfully executed," and he is provided with the means of fulfilling this obligation by his authority to commission all the officers of the United States, and, by and with the advice and consent of the Senate, to appoint the most important of them and to fill vacancies. He is declared to be commander-in-chief of the army and navy of the United States. The duties which are

> thus imposed upon him he is further enabled to perform by the recognition in the Constitution, and the creation by acts of Congress, of executive departments, which have varied in number from four or five to seven or eight, the heads of which are familiarly called cabinet ministers. These aid him in the performance of the great duties of his office, and represent him in a thousand acts to which it can hardly be supposed his personal attention is called, and thus he is enabled to fulfil the duty of his great department, expressed in the phrase that "he shall take care that the laws be faithfully executed."
>
> Is this duty limited to the enforcement of acts of Congress or of treaties of the United States according to their *express terms,* or does it include the rights, duties and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution?
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> * * * * *
>
> We cannot doubt the power of the President to take measures for the protection of a judge of one of the courts of the United States, who, while in the discharge of the duties of his office, is threatened with a personal attack which may probably result in his death, * * *.

Thus, if a United States Marshal in the exercise of the federal executive power may kill a man in the course of protecting a federal judge,

it would seem that the commanding general of the Western Defense Command may be designated to exercise the power of the chief executive to evacuate a group of civilians to protect the public safety of the entire country and the preservation of the sovereignty of the United States. Compare *Ex Parte Siebold,* 100 U. S. 371, 395; *In re Debs,* 158 U. S. 564.

However, it is unnecessary to determine whether the curfew and evacuation measures could have been carried out by executive action, unaided by legislation, for the Act of March 21, 1942, was enacted for the express purpose of throwing the full weight of Congressional power behind these measures. Compare *Hamilton* v. *Dillin,* 21 Wall. 73, 87–88:

> Whether, in the absence of Congressional action, the power of permitting partial intercourse with a public enemy may or may not be exercised by the President alone, who is constitutionally invested with the entire charge of hostile operations, it is not now necessary to decide, although it would seem that little doubt could be raised on the subject. * * *
>
> But without pursuing this inquiry, and whatever view may be taken as to the precise boundary between the legislative and executive powers in reference to the question under consideration, there is no doubt that a concurrence of both affords ample

> foundation for any regulations on the subject.

See also *Prize Cases,* 2 Black 635, 671.

3. ***The petitioner has not been denied due process of law.***—It is, of course, familiar doctrine that the exercise of governmental powers may interfere with one's liberty to a greater or lesser degree. The constitutional requirement of due process stands in the way only where the interference is of such character as to be wholly unreasonable, arbitrary, or capricious.

Thus, in sustaining provisions for compulsory vaccination in *Jacobson* v. *Massachusetts,* 197 U. S. 11, this Court said (p. 26):

> But the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members. * * *

See also *Compagnie Francaise &c.* v. *Board of Health,* 186 U. S. 380; *Minnesota* v. *Probate Court,* 309 U. S. 270; *Moyer* v. *Peabody,* 212 U. S. 78.[39] And since the reasonableness of the restraint

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[39] Compare the decisions upholding the confinement for reasons related to the public welfare of such persons as merchant seamen, jurors, material witnesses, etc. *Robertson* v. *Baldwin,* 165 U. S. 275; *Dinsman* v. *Wilkes,* 12 How. 389;

must always be measured in terms of the surrounding circumstances, it is apparent that restrictions demanded by the exigencies of war may go far beyond the limits permissible in periods of tranquillity.

The all-pervasive character of the war power has been discussed above, pp. 47–49. Its reach extends over the entire range of human affairs. Under the war power, the Government may, consistently with due process, regulate or take over the economic life of the country (*Highland* v. *Russell Car Co.*, 279 U. S. 253; *Northern Pac. Ry. Co.* v. *North Dakota*, 250 U. S. 135; *Dakota Cent. Tel. Co.* v. *South Dakota*, 250 U. S. 163); it may regulate the morals of the community (*McKinley* v. *United States*, 249 U. S. 397; *Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146); it may deny freedom of speech to an extent not permissible during times of peace (*Schenck* v. *United States*, 249 U. S. 47, 52); and it may command an individual to give up his freedom and lay down his life (*Selective Draft Law Cases*, 245 U. S. 366).

The curfew and exclusion measures herein are certainly less drastic than compulsory military service, and we do not understand petitioner to contend otherwise. The core of his contention is, however, that due process is lacking because the

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Lively v. *State*, 22 Okla. Cr. 271, 276–278, 211 Pac. 92, 94; *United States* v. *Von Bonim*, 24 F. Supp. 867 (S. D. N. Y.); *State* v. *Netherton*, 128 Kan. 564, 279 Pac. 19.

Japanese have been treated arbitrarily as a racial group [70] and because no opportunity was afforded for hearings to relieve individual members of that group from compliance with those measures. We submit that in the unique circumstances here presented the action taken was reasonable and therefore not violative of the requirements of due process.

Since, as we shall undertake to show, the classification is a reasonable one in the circumstances, it will be unnecessary to place more than passing reliance upon the fact that the Fifth Amendment, unlike the Fourteenth, contains no equal protection clause (see *Helvering* v. *Lerner Stores Corp.*, 314 U. S. 463, 468; *Sunshine Coal Co.* v. *Adkins*, 310 U. S. 381, 401; *Currin* v. *Wallace*, 306 U. S. 1, 14; *United States* v. *Carolene Products Co.*, 304 U. S. 144, 151; *Steward Machine Co.* v. *Davis*, 301 U. S. 548, 584; *LaBelle Iron Works* v. *United States*, 256 U. S. 377, 392), or to attempt to determine what, if any, type of governmental action is restrained by the equal protection clause that is not already fully subject to the due process clause (cf. *Heiner* v. *Donnan*, 285 U. S. 312, 317, 326, 338).

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[70] It is, of course, a misconception to assert that only Japanese have been subjected to curfew or have been removed from critical areas. Public Proclamation No. 3 imposed curfew restrictions for Italian and German aliens, and many individuals, alien and citizen alike, have been excluded under individual exclusion orders promulgated pursuant to Executive Order No. 9066.

Nor, in view of the extraordinarily unique situation in this case, will it be profitable to explore the various decisions either approving (*Gong Lum* v. *Rice*, 275 U. S. 78; *Clarke* v. *Deckebach*, 274 U. S. 392; *Terrace* v. *Thompson*, 263 U. S. 197; *Porterfield* v. *Webb*, 263 U. S. 225; *Webb* v. *O'Brien*, 263 U. S. 313; *Frick* v. *Webb*, 263 U. S. 326; *Crain* v. *New York*, 239 U. S. 195; *Patsone* v. *Pennsylvania*, 232 U. S. 138; *Plessy* v. *Ferguson*, 163 U. S. 537), or disapproving (*Mitchell* v. *United States*, 313 U. S. 80, 97; *Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337; *Truax* v. *Raich*, 239 U. S. 33; *Meyer* v. *Nebraska*, 262 U. S. 390; *Yu Cong Eng* v. *Trinidad*, 271 U. S. 500; *Yick Wo* v. *Hopkins*, 118 U. S. 356) various classifications based upon racial or similar grounds.

The situation which gave rise to the curfew and evacuation measures was wholly unprecedented in the history of this country. The validity of those measures must be tested, not in the light of the military situation as it exists today, nor even in the light of the military situation as it existed at that time viewed as a matter of hindsight. Rather, the crucial question is whether the action taken was, in the honest judgment of those charged with the responsibility of defending our shores, reasonably necessary from a military point of view. We submit that, as recounted above (p. 12 *et seq.*), the military situation was so grave, the danger of an enemy attack was so far within

the realm of probability, and the peril to be apprehended from treacherous assistance to the enemy on the part of an unknown number of Japanese concentrated in critical areas along the West Coast was so substantial, it was a matter of high military necessity to take prompt and adequate precautionary steps.

Our Pacific Fleet had been rendered all but powerless for the time being, and the Japanese forces were making bold and impressive strides. Indeed, our very coast had been shelled. Faced with the responsibility of repelling a possible Japanese invasion which might have threatened the very integrity of our nation, it was the duty of the commanding general to take into account the plain fact that over 100,000 Japanese were grouped along the coast. It was essential to recognize that although the majority of these people might be regarded as loyal to the United States, a disloyal minority, if only a few hundreds or thousands, strategically placed, might spell the difference between the success or failure of any attempted invasion.

This grave emergency called for prompt and decisive action. It was imperative that adequate protective measures be taken. If those Japanese who might aid the enemy were either known or readily identifiable, the task of segregating them would probably have been comparatively simple. However, the identities of the potentially disloyal

were not readily discoverable. Even assuming that administrative hearings might have been held for each Japanese, such hearings would have been virtually worthless unless each were preceded by an investigation carefully conducted by a trained investigator. Many months, or perhaps years, would be required for such investigations and hearings.[71] Meanwhile the threat of a Japanese attack would persist. What was needed was a method of removing at once the unknown number of Japanese persons who might assist a Japanese invasion, and not a program for sifting out such persons in the indefinite future.

Moreover, even if there had been time for individual hearings, there is no reason to suppose that they could have solved the problem. A hearing to determine what a particular Japanese would do in the event that the Japanese forces should succeed in effecting a landing on the Pacific Coast would have been of doubtful utility. In every such hearing there would undoubtedly be evidence of thrift, industry, devotion to family, absence of criminal record, etc. And it would be upon the basis of such evidence that the Hearing Board would be asked to look deep into the mind of a particular Japanese and determine whether his

[71] Based on investigations by the Federal Bureau of Investigation over a course of years, about 10,000 hearings have been granted to alien enemies throughout the United States since December 7, 1941.

allegiance to the United States was so dominant within him as to overcome the ties of kinship or other intangible forces which might bind him to the members of an invading Japanese army.

It can hardly be said, therefore, that the exclusion of all Japanese from the critical West Coast area was unreasonable or capricious. They were treated as a group, not because of racial discrimination, but because the group contained an unknown number of persons whose continued presence on the West Coast was thought to be highly dangerous to the safety of the entire country. Their removal was imperative. Since they were not easily identifiable, the only certain way of removing them was to remove the group as a whole.

Furthermore, where the class as a whole is the proper object of official action a hearing for any individual is entirely irrelevant except to determine membership in the class. The operative fact on which the classification was made was the danger arising from the existence of a group of over 100,000 persons of Japanese descent on the West Coast and the virtually impossible task of promptly segregating the potentially disloyal from the loyal. "It does not follow that because a transaction [person in this case] separately considered is innocuous it may not be included in a prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the Gov-

ernment." *Jacob Ruppert* v. *Caffey*, 251 U. S. 264, 291–292.

It is the central misapprehension of the argument for individual loyalty hearings to suppose that the action here was directed against persons on the basis of their individual loyalty. It is entirely irrelevant, therefore, to assert that the majority of the individuals evacuated were perfectly loyal citizens of the United States. The rationale of the action here in controversy is not the loyalty or disloyalty of individuals but the danger from the residence of the class as such within a vital military area. If there was a rational basis for this judgment, then the only question that remains is whether a given individual was or was not a person of Japanese ancestry.

In times of war a citizen may be required, under the Constitution, to make the supreme sacrifice (*Selective Draft Law Cases, supra*). Can it be said that there is an absence of due process where he is required to evacuate critical areas in order to insure the evacuation of persons within his group whose presence is reasonably regarded as a significant threat to the safety of the nation? In sustaining the detention of a British subject merely upon the ground that the Home Secretary had reason to believe that he was a person of "hostile origin or associations", Lord Macmillan de-

clared (*Liversidge* v. *Anderson*, [1942] A. C. 206, 257):

> At a time when it is the undoubted law of the land that a citizen may by conscription or requisition be compelled to give up his life and all that he possesses for his country's cause it may well be no matter for surprise that there should be confided to the Secretary of State a discretionary power of enforcing the relatively mild precaution of detention. * * *

The objection that the exclusion measure was invalid because it did not include Italians and Germans is without substance. The principal danger to be apprehended was a Japanese invasion, and the possible assistance to attacking Japanese forces would be most likely to come from the Japanese residing on the West Coast. It is not a denial of due process to recognize degrees of danger or harm and if the law strikes at the evil where it is most felt, "it is not be overthrown because there are other instances to which it might have been applied." See *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379, 400, and cases cited.

4. *The Act of March 21, 1942, does not involve any unconstitutional delegation of legislative power.*—The contention that the Act of March 21, 1942, contains an invalid delegation of legislative authority is without merit. It should be recalled that Executive Order 9066, under which the evacuation and curfew orders were issued, had been pro-

mulgated on February 19, 1942, more than a month before the enactment of the statute. And, as shown above, p. 39, it was the recognized purpose of the statute to implement Executive Order 9066 and to place its legality beyond the possibility of challenge. Moreover, the history of the Act shows that Congress was plainly concerned with the projected evacuation program and with such subsidiary protective measures as the curfew. See *supra*, pp. 38–41. Accordingly, even tested by the usual standards applicable to legislation dealing with ordinary domestic affairs, the Act of March 21, 1942, when construed in the light of its history, did not go beyond the limits of permissible delegation. Cf. *Field* v. *Clark*, 143 U. S. 649; *Buttfield* v. *Stranahan*, 192 U. S. 470; *Union Bridge Co.* v. *United States*, 204 U. S. 364; *United States* v. *Grimaud*, 220 U. S. 506; *Hampton & Co.* v. *United States*, 276 U. S. 394; *Currin* v. *Wallace*, 306 U. S. 1; *United States* v. *Rock Royal Co-op.*, 307 U. S. 533; *Sunshine Coal Co.* v. *Adkins*, 310 U. S. 381; *Opp Cotton Mills* v. *Administrator*, 312 U. S. 126. Indeed, to the extent that the statute may be viewed as ratifying prior executive action (see *supra*, p. 42), there was no delegation whatever. Cf. *Prize Cases*, 2 Black 635, 671; *Hamilton* v. *Dillin*, 21 Wall. 73, 87, 88.

But there is an even more conclusive answer to the contention that there was an invalid delegation. We are here concerned with the war power which

requires a far wider latitude for executive judgment and action than is involved in the exercise of ordinary governmental powers.

Where the war power is involved, the very fate of the nation may at times depend upon prompt and effective measures taken under a general program outlined by the legislature that might otherwise be impossible under a statute which too narrowly circumscribed the area of executive discretion. Moreover, in view of the wide range of human affairs to which the war power extends and in view of the rapidly changing state of conditions during times of strife, it is peculiarly appropriate, as it is traditional, to avoid legislative particularization.

Thus, during the first World War a statute authorized the President "to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable." *Northern Pac. Ry. Co.* v. *North Dakota*, 250 U. S. 135, 142. And without differentiating between the executive and legislative branches of the Government, the Court gave effect to the statute on the basis of the "complete and undivided character of the war power." 250 U. S. at 149.

Similarly in *Dakota Cent. Tel. Co.* v. *South Dakota,* 250 U. S. 163, which involved a statute empowering the President to assume control of any system of communication (p. 181) "and to operate the same in such manner as may be needful or desirable for the duration of the war," the Court stated (p. 183):

> That under its war power Congress possessed the right to confer upon the President the authority which it gave him we think needs nothing here but statement, as we have disposed of that subject in the *North Dakota Railroad Rate Case.* And the completeness of the war power under which the authority was exerted and by which completeness its exercise is to be tested suffices, we think, to dispose of the many other contentions urged as to the want of power in Congress to confer upon the President the authority which it gave him.

That the generality of the Congressional mandate can not be subject to successful attack if it is as specific as circumstances reasonably permit was recognized in *United States* v. *Chemical Foundation,* 272 U. S. 1. In referring to legislation dealing with the disposition of enemy property, the Court said (p. 12):

> The Act went as far as was reasonably practicable under the circumstances existing. It was peculiarly within the province of the Commander-in-Chief to know the

> facts and to determine what disposition should be made of enemy properties in order effectively to carry on the war. * * *

See also *McKinley* v. *United States*, 249 U. S. 397; *Highland* v. *Russell Car Co.*, 279 U. S. 253.[72]

The war power is in this respect similar to the general federal power in the field of foreign relations under which, as this Court has ruled, Congress may accord the Executive "a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved." *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 320.[73] And the opin-

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[72] Compare *The Thomas Gibbons*, 8 Cranch 420, where the Court dealt with a statute authorizing the President "'to establish and order suitable instructions for the better governing and directing the conduct' of private armed vessels," under which the President had commissioned privately owned vessels and instructed their masters as to the capture of prize (8 Cranch at 426). The Court said that it did "not think it necessary to consider how far he (the President) would be entitled, in his character of commander in chief * * * independent of any statute" to take such action because he was clearly authorized to take it by the statute. On this point, the Court held: "The language of this provision (quoted above) is very general, and in our opinion, it is entitled to a liberal construction, both upon the manifest intent of the legislature, and the ground of public policy" (8 Cranch at 426).

[73] Only in two instances has this Court declared legislation invalid on the ground of excessive delegation. *Panama Refining Co.* v. *Ryan*, 293 U. S. 388; *Schechter Poultry Corp.* v. *United States*, 295 U. S. 495. However, the Court in the *Curtiss-Wright* case apparently thought that those decisions were wholly irrelevant where the field of foreign relations is

ion of the Court made clear that the power "to declare and wage war" is to be treated as cognate to the power "to make treaties [and] to maintain diplomatic relations with other sovereignties (299 U. S. at p. 318) [74]

Finally, the contention that there has been an unconstitutional delegation of legislative power must fail for an entirely different reason. As we have endeavored to show above, pp. 52–56, the various orders here under review were a proper exercise of executive power derived directly from the Constitution. If that position is correct, then they do not need any Congressional support. The mere fact that Congress has undertaken to implement those orders by declaring that one who violates them shall be guilty of a misdemeanor, does not detract from the central consideration that the orders may be treated as resting independently upon their own foundation. Cf. *Ky. Whip & Collar Co.* v. *I. C. R. Co.*, 299 U. S. 334.

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involved, for it did not even cite the *Schechter* case, and it made only an oblique reference to the *Panama Refining* case, 299 U. S. at p. 327.

[74] The opinion also adverted to numerous instances in the history of the United States where Congress had conferred exceedingly broad authority upon the Executive. 299 U. S. at 322–327. Thus, as early as 1794, the President was "authorized" "whenever, in his opinion, the public safety shall so require" to lay an embargo upon all ships and vessels in ports of the United States "under such regulations as the circumstances of the case may require, and to continue or revoke the same, whenever he shall think proper" (c. 41, 1 Stat. 372).

III

NO DETENTION OF THE DEFENDANT IN A WAR RELOCATION CENTER IS INVOLVED IN THIS CASE

In addition to the curfew violation, the defendant has been convicted of failure to report to a Civil Control Station in the locality of his residence for instructions pertaining to evacuation. The defendant did not appear for the instructions and thereafter did not appear for the evacuation and was not evacuated. He did not become a resident of any assembly center operated by the military authorities or of any war relocation center operated by the War Relocation Authority. He was confined in King County Jail, Seattle, Washington, until after his conviction (R. 28). Thereafter, he was admitted to bail and granted permission by the military authorities to leave the military area and to proceed inland to reside and to accept employment.

It was contended in the court below that the conviction involves the question of the constitutionality of the restraint upon the liberty of Japanese persons not only during evacuation and during temporary residence in assembly centers but also subsequently in war relocation centers. The Government has not urged that the defendant's failure to report for evacuation instructions limits his contentions to the question whether this requirement to report was a reasonable aid to

evacuation and that he is barred from questioning the validity of the evacuation. In other words, it is not urged that the defendant's standing to contest the constitutionality of the evacuation would be greater if he had appeared for the preliminary instructions on May 11 or 12, 1942, but had failed to appear for evacuation as instructed on or before May 16, 1942. The Government contends that the requirement that all persons affected report for preliminary instructions was a reasonable regulation ancillary and incidental to valid evacuation and that the evacuation was valid as applicable to the defendant. Moreover, the Government does not contend that the defendant could not question the validity of such temporary restrictions on his personal liberty as would necessarily be required in connection with providing food, shelter, and protection for so large a group of people during the temporary period required to assemble them and to evacuate them from the military area to places where they could safely reside.

On the other hand, the Government does urge that this defendant has no standing whatsoever to question the constitutionality of any restraint which may have been placed subsequently upon the freedom of movement of other persons of Japanese ancestry who have been removed from the military areas and are residing in war relocation centers pending the procurement of places

of residence and employment elsewhere for them without any restraint in various communities throughout the United States. It is true, as appears from General DeWitt's proclamations summarized below, that if the defendant had appeared for evacuation he probably would have been sent to an assembly center and subsequently to a war relocation center and prohibited from departing from the assembly center or war relocation center without obtaining permission. It must be noted, however, that the defendant has indicated that he was able to arrange for a residence and employment inland even after conviction and while imprisoned. If he had complied with the evacuation program he might have been able to obtain such employment at the time of evacuation and to have obtained permission to proceed inland to the place of employment either before being transported to an assembly center or thereafter while residing in an assembly center or in a war relocation center as has happened in the case of numerous other evacuees. In view of these numerous alternatives which were available to the defendant to obtain freedom from restraint on personal movement, he cannot now contend that evacuation was unconstitutional because other persons who have been evacuated are still residing in war relocation centers. A fuller chronological account of the various steps taken in connection

with the execution of the evacuation program will perhaps be helpful.

Restraint on movement of Japanese persons in military areas pending evacuation.—In order to conduct evacuation of so large a group of persons in an orderly manner and in order to protect them from the resistance of inland communities to an unregulated voluntary migration of Japanese, the proclamations and civilian exclusion orders placed the following restraints on the movements of Japanese in designated military areas.

Civilian Exclusion Order No. 1 of March 24, 1942, *infra,* p. 114, pursuant to Public Proclamations Nos. 1 and 2, ordered that all persons of Japanese ancestry be excluded from that portion of Military Area No. 1 described as "Bainbridge Island" in the State of Washington on or before noon March 30, 1942, either by voluntary removal of such persons to a place of their own choice outside of Military Area No. 1 on or prior to March 29 or by evacuation on March 30 to such place as should then be prescribed. Instructions to all Japanese living on Bainbridge Island, which accompanied Civilian Exclusion Order No. 1, advised them that no Japanese person would be permitted to leave or enter Bainbridge Island after 9 A. M. on March 24 without obtaining permission from the Civil Control Office established on the Island; that individuals and families would be permitted to leave prior to the date for

complete evacuation on condition that their destination be outside of Military Area No. 1 and that arrangements would have been made for employment and shelter at the destination; and that evacuees who did not go to an approved destination of their own choice would be given temporary residence in a Reception Center under Government supervision outside of Military Area No. 1.

Public Proclamation No. 4 of March 27, 1942 (7 F. R. 2601), *infra*, p. 110, provided that whereas it was necessary to restrict and regulate the migration in order to provide for the welfare and assure the orderly evacuation and resettlement of Japanese voluntarily migrating from Military Area No. 1, commencing at midnight March 29, 1942, all Japanese persons were prohibited from leaving the military area for any purpose until and to the extent that a future proclamation or order would permit or direct.[75]

Thereafter Japanese persons were not permitted to depart from Military Area No. 1 to places of their own choice but were required to report for evacuation to Civil Control Stations of General DeWitt's Wartime Civil Control Administration in their neighborhood, and were evacuated to Assembly Centers established and operated by the WCCA. A series of similar Civil Exclusion

[75] Voluntary and unregulated evacuation had resulted in threats to the Japanese and public disturbance in communities outside of Military Area No. 1, in which the Japanese had sought to resettle. Tolan Committee Report, pp. 17, 201 *et seq.*

Orders up to and including Civilian Exclusion Order No. 99 dated May 30, 1942 (7 F. R. 4437), were issued for particular portions of Military Area No. 1 and pursuant to these orders the Japanese population was transferred to Assembly Centers and then to War Relocation Authority Relocation Centers when they became ready for occupancy.

Public Proclamation No. 6 of June 2, 1942 (7 F. R. 4436), provided that all Japanese persons within the California portion of Military Area No. 2 (all of California not within the coastal Military Area No. 1, were prohibited from leaving that area or, if outside, from entering Military Areas Nos. 1 and 2 without permission.[78] This proclamation extended the curfew for all Japanese persons to the California portion of Military Area No. 2. Civilian Exclusion Order No. 100 dated June 30, 1942 (7 F. R. 5369, 5370), to Civilian Exclusion Order No. 108 dated July 22, 1942 (F. R. 5915, 5916), excluded all Japanese from designated parts of the California portion of Military Area No. 2.

Public Proclamation No. 7 of June 8, 1942 (7 F. R. 4498), ratified and confirmed all exclusions under Civilian Exclusion Orders Nos. 1 to 99 and excluded all persons who might not already have

[78] Public Proclamation No. 5 of March 30, 1942 (7 F. R. 2713), not here involved, provided that certain classes of German and Italian aliens could apply for exemption from any evacuation or from observance of the curfew regulation applied to all alien enemies and persons of Japanese ancestry by Public Proclamation No. 3 (7 F. R. 2543).

been excluded by the Civilian Exclusion Orders with the exception of those already within established Wartime Civil Control Administration Assembly Centers or the area of a War Relocation Authority Project.

Public Proclamation No. 8 of June 27, 1942 (7 F. R. 8346), established each War Relocation Authority Center within the Western Defense Command as a War Relocation Project Area and required all Japanese persons within such area to remain therein unless the Japanese person should, before leaving the area, "obtain a written authorization executed by or pursuant to the express authority of this [General DeWitt's] headquarters setting forth the effective period of said authorization and the terms and conditions upon and purposes for which it has been granted." [77]

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[77] Public Proclamation No. 9 of June 27, 1942 (7 F. R. 5719), not here involved, rescinded paragraph 6 of Public Proclamation No. 1 which had adopted and continued in effect the designation of prohibited and restricted areas by the Attorney General pursuant to Presidential proclamations of December 7 and 8, 1941. Public Proclamation No. 10, of August 5, 1942 (7 F. R. 6631), not here involved, provided dimout and lighting restrictions within a zone of restricted lighting. Public Proclamation No. 12 of October 10, 1942 (7 F. R. 8377), not here involved, amended Public Proclamation No. 10 in respect of lighting regulations. Public Proclamation No. 13 of October 13, 1942 (7 F. R. 8565), not here involved, following the amendment of the Attorney General's Regulations exempting all Italian aliens from the general classification of alien enemies, exempted Italian aliens, and all alien enemies during military service in the armed forces of the United States, from military curfew and travel regulations.

Public Proclamation No. 11 of August 18, 1942 (7 F. R. 6703), ratified and confirmed Civilian Exclusion Orders Nos. 100 to 108 inclusive and excluded from the California portion of Military Area No. 2 all Japanese persons not heretofore excluded with the exception of those within the bounds of an established Wartime Civil Control Administration Assembly Center or the area of the War Relocation Authority Project, and those within penal or internment institutions or those with military permits.

Pursuant to Executive Order No. 9102, the War Relocation Authority adopted regulations dated September 26, 1942 (7 F. R. 7656) in respect of issuance of leave "as a matter or right" for departure from War Relocation Areas.[78] These regulations provide for a short term leave for not more than 30 days, leave to participate in a work group outside the relocation center or indefinite leave for residence outside the relocation Area. The Project Director of the relocation center in which the applicant resides is authorized to grant a short term or work group leave. Indefinite leave is granted by the Director of the War Relocation Authority after securing from the Federal Bureau of Investigation any information obtainable and

[78] Regulations for enlistment in the War Relocation Authority Work Corps pursuant to Executive Order No. 9102 were issued on April 29, 1942 (7 F. R. 3231), but were thereafter revoked on December 19, 1942 (7 F. R. 10667).

after taking steps necessary to satisfy himself concerning the applicant's means of support, willingness to make required reports, opportunity for employment and residence at proposed destination, probable effect of the leave upon the war program and the public peace and safety, and such other conditions and factors as may be relevant. Reports of changes of address and employment are required from the persons on leave. The regulations provide that the Director may revoke any leave when conditions are so far changed or when such additional information has become available that an original application for leave would be denied. Upon expiration of any leave the applicant shall return to the Relocation Center unless otherwise directed by the Director of the War Relocation Authority.

Under the public proclamations and civilian exclusion orders, on and after March 29, 1942, no Japanese person including the defendant could leave Military Area No. 1 voluntarily and every such person was required to be evacuated into an assembly center or relocation center from which he could not depart without violation of a military regulation and the Act of March 21, 1942, or without permission granted by the military authorities or the War Relocation Authority.

Release of Japanese from restrictions.—During and subsequent to evacuation the military and war relocation authorities pursued the policy

of releasing Japanese from assembly and relocation centers as quickly as employment and residences could be found for them in communities which would accept them. An undetermined but considerable number of Japanese at the time of evacuation were permitted to go directly inland instead of going through assembly centers when they were able to establish that residence and employment were provided for them through the assistance of relatives or others. A large number of Japanese were evacuated directly to agricultural areas to assist in harvesting the sugar beet and other crops and thereafter obtained other employment or entered assembly or relocation centers. Numerous Japanese persons were released from assembly centers for purposes of employment and residence elsewhere. A principal purpose of the program of the War Relocation Authority is to grant indefinite leave to Japanese for whom employment and safe residence can be found outside of military areas.

The group of 808 Japanese affected by Civilian Exclusion Order No. 57, applicable to the defendant, was evacuated to the Puyallup Assembly Center in the State of Washington within Military Area No. 1, and thereafter was transferred to the Minidoka War Relocation Center in the State of Idaho. Over 10% of the 10,000 residents of this relocation center already have been

released upon indefinite, group, or temporary leave; and a much larger percentage of the young adult American educated men in the center, such as the defendant, have been released.

It is clear from the actual operation of the evacuation and relocation program that the defendant, who was granted permission to leave the military area and to take up residence and employment inland even after the conviction, would have had substantial opportunities to have proceeded to a residence and employment inland if he had complied with the evacuation and relocation program. It cannot be contended that if he had complied he would now be in detention in a war relocation center and therefore has a standing to raise the validity of that detention in this criminal proceeding. An individual will not be heard to question the constitutionality of the application of a regulation to other persons under circumstances not applicable to him. Cf. *Tyler* v. *Judges of Court of Registration,* 179 U. S. 405, 410; *Corporation Commission* v. *Lowe,* 281 U. S. 431; *Hatch* v. *Reardon,* 204 U. S. 152; *Electric Bond Co.* v. *Comm'n,* 303 U. S. 419, 443.

CONCLUSION

The judgment of the District Court should be affirmed.

Respectfully submitted.

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MAY 1943.

APPENDIX A

Constitution of the United States:

ARTICLE I

SECTION 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; * * *

* * * * *

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

* * * * *

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers

vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

* * * * *

ARTICLE II

SECTION 1. The executive Power shall be vested in a President of the United States of America. * * *

* * * * *

SECTION 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; * * *

* * * * *

SECTION 3. * * * he shall take Care that the Laws be faithfully executed, * * *.

Fifth Amendment:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment:

SECTION 1. All persons born or naturalized in the United States, and subject to the

jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * * *

APPENDIX B

STATUTES

Declaration of War Between United States and Japan (c. 561, 55 Stat. 795):

> Whereas the Imperial Government of Japan has committed unprovoked acts of war against the Government and the people of the United States of America: Therefore be it
>
> *Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That the state of war between the United States and the Imperial Government of Japan which has thus been thrust upon the United States is hereby formally declared; and the President is hereby authorized and directed to employ the entire naval and military forces of the United States and the resources of the Government to carry on war against the Imperial Government of Japan; and, to bring the conflict to a successful termination, all of the resources of the country are hereby pledged by the Congress of the United States.
>
> Approved, December 8, 1941, 4:10 p. m., E. S. T.

Act of March 21, 1942 (Public Law 503, 77th Cong., 2d Sess., c. 191, 56 Stat. 173, U. S. C., Tit. 18, Sec. 97a):

> *Be it enacted by the Senate and House of Representatives of the United States of*

America in Congress assembled, That whoever shall enter, remain in, leave, or commit any act in any military area or military zone prescribed, under the authority of an Executive order of the President, by the Secretary of War, or by any military commander designated by the Secretary of War, contrary to the restrictions applicable to any such area or zone or contrary to the order of the Secretary of War or any such military commander, shall, if it appears that he knew or should have known of the existence and extent of the restrictions or order and that his act was in violation thereof, be guilty of a misdemeanor and upon conviction shall be liable to a fine of not to exceed $5,000 or to imprisonment for not more than one year, or both, for each offense.

Approved, March 21, 1942.

Act of April 20, 1918, c. 59, 40 Stat. 533, as amended by c. 926, 54 Stat. 1220, and c. 388, 55 Stat. 655 (U. S. C., Tit. 50, Secs. 104, 105):

SEC. 4. DEFINITION OF NATIONAL-DEFENSE TERMS.—The words "national-defense material" as used herein, shall include arms, armament, ammunition, livestock, stores of clothing, food, foodstuffs, fuel, supplies munitions, and all other articles of whatever description and any part or ingredient thereof, intended for the use of the United States in connection with the national defense or for use in or in connection with the producing, manufacturing, repairing, storing, mining, extracting, distributing, loading, unloading, or transporting of any of the materials or other articles hereinbefore mentioned or any part or ingredient thereof.

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The words "national-defense premises", as used herein, shall include all buildings, grounds, mines, or other places wherein such national-defense material is being produced, manufactured, repaired, stored, mined, extracted, distributed, loaded, unloaded, or transported, together with all machinery and appliances therein contained; and all forts, arsenals, navy yards, camps, prisons, or other military or naval stations of the United States.

The words "national-defense utilities", as used herein, shall include all railroads, railways, electric lines, roads of whatever description, railroad or railway fixture, canal, lock, dam, wharf, pier, dock, bridge, building, structure, engine, machine, mechanical contrivance, car, vehicle, boat, or aircraft, or any other means of transportation whatsoever, whereon or whereby such national-defense material, or any troops of the United States, are being or may be transported either within the limits of the United States or upon the high seas; and all dams, reservoirs, aqueducts, water and gas mains and pipes, structures, and buildings, whereby or in connection with which water or gas may be furnished to any national-defense premises or to the military or naval forces of the United States, and all electric light and power, steam or pneumatic power, telephone and telegraph plants, poles, wires, and fixtures and wireless stations, and the buildings connected with the maintenance and operation thereof used to supply water, light, heat, power, or facilities of communication to any national-defense premises or to the military or naval forces of the United States.

SEC. 5. DESTROYING OR INJURING NATIONAL DEFENSE MATERIALS, ETC.—Whoever, with intent to injure, interfere with, or obstruct the national defense of the United States, shall wilfully injure or destroy, or shall attempt to so injure or destroy, any national-defense material, national-defense premises, or national-defense utilities, as herein defined, shall, upon conviction thereof, be fined not more than $10,000 or imprisoned not more than ten years, or both.

APPENDIX C

EXECUTIVE ORDER No. 9066, dated February 19, 1942, 7 F. R. 1407

AUTHORIZING THE SECRETARY OF WAR TO PRESCRIBE MILITARY AREAS

WHEREAS the successful prosecution of the war requires every possible protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities as defined in Section 4, Act of April 20, 1918, 40 Stat. 533, as amended by the Act of November 30, 1940, 54 Stat. 1220, and the Act of August 21, 1941, 55 Stat. 655 (U. S. C., Title 50, Sec. 104):

NOW, THEREFORE, by virtue of the authority vested in me as President of the United States, and Commander in Chief of the Army and Navy, I hereby authorize and direct the Secretary of War, and the Military Commanders whom he may from time to time designate, whenever he or any designated Commander deems such action necessary or desirable, to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion. The Secretary of War is hereby

authorized to provide for residents of any such area who are excluded therefrom, such transportation, food, shelter, and other accommodations as may be necessary, in the judgment of the Secretary of War or the said Military Commander, and until other arrangements are made, to accomplish the purpose of this order. The designation of military areas in any region or locality shall supersede designations of prohibited and restricted areas by the Attorney General under the Proclamations of December 7 and 8, 1941, and shall supersede the responsibility and authority of the Attorney General under the said Proclamations in respect of such prohibited and restricted areas.

I hereby further authorize and direct the Secretary of War and the said Military Commanders to take such other steps as he or the appropriate Military Commander may deem advisable to enforce compliance with the restrictions applicable to each Military area hereinabove authorized to be designated, including the use of Federal troops and other Federal Agencies, with authority to accept assistance of state and local agencies.

I hereby further authorize and direct all Executive Departments, independent establishments and other Federal Agencies, to assist the Secretary of War or the said Military Commanders in carrying out this Executive Order, including the furnishing of medical aid, hospitalization, food, clothing, transportation, use of land, shelter, and other supplies, equipment, utilities, facilities, and services.

This order shall not be construed as modifying or limiting in any way the authority heretofore

granted under Executive Order No. 8972, dated December 12, 1941, nor shall it be construed as limiting or modifying the duty and responsibility of the Federal Bureau of Investigation, with respect to the investigation of alleged acts of sabotage or the duty and responsibility of the Attorney General and the Department of Justice under the Proclamations of December 7 and 8, 1941, prescribing regulations for the conduct and control of alien enemies, except as such duty and responsibility is superseded by the designation of military areas hereunder.

EXECUTIVE ORDER No. 9102, dated March 18, 1942, 7 F. R. 2165

ESTABLISHING THE WAR RELOCATION AUTHORITY IN THE EXECUTIVE OFFICE OF THE PRESIDENT AND DEFINING ITS FUNCTIONS AND DUTIES

By virtue of the authority vested in me by the Constitution and statutes of the United States, as President of the United States and Commander in Chief of the Army and Navy, and in order to provide for the removal from designated areas of persons whose removal is necessary in the interests of national security, it is ordered as follows:

1. There is established in the Office for Emergency Management of the Executive Office of the President the War Relocation Authority, at the head of which shall be a Director appointed by and responsible to the President.

2. The Director of the War Relocation Authority is authorized and directed to formulate

and effectuate a program for the removal, from the areas designated from time to time by the Secretary of War or appropriate military commander under the authority of Executive Order No. 9066 of February 19, 1942, of the persons or classes of persons designated under such Executive Order, and for their relocation, maintenance, and supervision.

3. In effectuating such program the Director shall have authority to—(a) Accomplish all necessary evacuation not undertaken by the Secretary of War or appropriate military commander, provide for the relocation of such persons in appropriate places, provide for their needs in such manner as may be appropriate, and supervise their activities.

(b) Provide, insofar as feasible and desirable, for the employment of such persons at useful work in industry, commerce, agriculture, or public projects, prescribe the terms and conditions of such public employment, and safeguard the public interest in the private employment of such persons.

(c) Secure the cooperation, assistance, or services of any governmental agency.

(d) Prescribe regulations necessary or desirable to promote effective execution of such program, and, as a means of coordinating evacuation and relocation activities, consult with the Secretary of War with respect to regulations issued and measures taken by him.

(e) Make such delegations of authority as he may deem necessary.

(f) Employ necessary personnel, and make such expenditures, including the making of loans and grants and the purchase of real property, as may be necessary, within the limits of such funds as may be made available to the Authority.

4. The Director shall consult with the United States Employment Service and other agencies on employment and other problems incident to activities under this order.

5. The Director shall cooperate with the Alien Property Custodian appointed pursuant to Executive Order No. 9095 of March 11, 1942, in formulating policies to govern the custody, management, and disposal by the Alien Property Custodian of property belonging to foreign nationals removed under this order or under Executive Order No. 9066 of February 19, 1942; and may assist all other persons removed under either of such Executive Orders in the management and disposal of their property.

6. Departments and agencies of the United States are directed to cooperate with and assist the Director in his activities hereunder. The Departments of War and Justice, under the direction of the Secretary of War and the Attorney General, respectively, shall insofar as consistent with the national interest provide such protective, police and investigational services as the Director shall find necessary in connection with activities under this order.

7. There is established within the War Relocation Authority the War Relocation Work Corps. The Director shall provide, by general regulations,

for the enlistment in such Corps, for the duration of the present war, of persons removed under this order or under Executive Order No. 9066 of February 19, 1942, and shall prescribe the terms and conditions of the work to be performed by such Corps, and the compensation to be paid.

8. There is established within the War Relocation Authority a Liaison Committee on War Relocation which shall consist of the Secretary of War, the Secretary of the Treasury, the Attorney General, the Secretary of Agriculture, the Secretary of Labor, the Federal Security Administrator, the Director of Civilian Defense, and the Alien Property Custodian, or their deputies, and such other persons or agencies as the Director may designate. The Liaison Committee shall meet at the call of the Director and shall assist him in his duties.

9. The Director shall keep the President informed with regard to the progress made in carrying out this order, and perform such related duties as the President may from time to time assign to him.

10. In order to avoid duplication of evacuation activities under this order and Executive Order No. 9066 of February 19, 1942, the Director shall not undertake any evacuation activities within military areas designated under said Executive Order No. 9066, without the prior approval of the Secretary of War or the appropriate military commander.

11. This order does not limit the authority granted in Executive Order No. 8972 of December 12, 1941; Executive Order No. 9066 of February 19, 1942; Executive Order No. 9095 of March

11, 1942; Executive Proclamation No. 2525 of December 7, 1941; Executive Proclamation No. 2526 of December 8, 1941; Executive Proclamation No. 2527 of December 8, 1941; Executive Proclamation No. 2533 of December 29, 1941; or Executive Proclamation No. 2537 of January 14, 1942; nor does it limit the functions of the Federal Bureau of Investigation.

APPENDIX D

Public Proclamation No. 1, 7 F. R. 2320

WAR DEPARTMENT

(Public Proclamation No. 1)

Headquarters Western Defense Command and Fourth Army, Presidio of San Francisco, California

MILITARY AREAS NOS. 1 AND 2 DESIGNATED AND ESTABLISHED

MARCH 2, 1942.

To: The people within the States of Arizona, California, Oregon, and Washington, and the Public Generally.

Whereas by virtue of orders issued by the War Department on December 11, 1941, that portion of the United States lying within the States of Washington, Oregon, California, Montana, Idaho, Nevada, Utah and Arizona and the Territory of Alaska has been established as the Western Defense Command and designated as a Theatre of Operations under my command; and

Whereas by Executive Order No. 9066, dated February 19, 1942, the President of the United States authorized and directed the Secretary of War and the Military Commanders whom he may from time to time designate, whenever he or any

such designated commander deems such action necessary or desirable, to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded, and with respect to which the right of any person to enter, remain in or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion; and

Whereas the Secretary of War on February 20, 1942, designated the undersigned as the Military Commander to carry out the duties and responsibilities imposed by said Executive Order for that portion of the United States embraced in the Western Defense Command; and

Whereas the Western Defense Command embraces the entire Pacific Coast of the United States which by its geographical location is particularly subject to attack, to attempted invasion by the armed forces of nations with which the United States is now at war, and, in connection therewith, is subject to espionage and acts of sabotage, thereby requiring the adoption of military measures necessary to establish safeguards against such enemy operations:

Now, therefore, I, J. L. DeWitt, Lieutenant General, U. S. Army, by virtue of the authority vested in me by the President of the United States and by the Secretary of War and my powers and prerogatives as Commanding General of the Western Defense Command, do hereby declare that:

1. The present situation requires as a matter of military necessity the establishment in the territory embraced by the Western Defense Command of Military Areas and Zones thereof as defined in Exhibit 1, hereto attached, and as generally shown on the map attached hereto and marked Exhibit 2.

2. Military Areas Nos. 1 and 2, as particularly described and generally shown hereinafter and in Exhibits 1 and 2 hereto, are hereby designated and established.

3. Within Military Areas Nos. 1 and 2 there are established Zone A–1, lying wholly within Military Area No. 1; Zones A–2 to A–99, inclusive, some of which are in Military Area No. 1, and the others in Military Area No. 2; and Zone B, comprising all that part of Military Area No. 1 not included within Zones A–1 to A–99, inclusive; all as more particularly described and defined and generally shown hereinafter and in Exhibits 1 and 2.

Military Area No. 2 comprises all that part of the States of Washington, Oregon, California and Arizona which is not included within Military Area No. 1, and is shown on the map (Exhibit 2) as an unshaded area.

4. Such persons or classes of persons as the situation may require will by subsequent proclamation be excluded from all of Military Area No. 1 and also from such of those zones herein described as Zones A–2 to A–99, inclusive, as are within Military Area No. 2.

Certain persons or classes of persons who are by subsequent proclamation excluded from the zones last above mentioned may be permitted,

under certain regulations and restrictions to be hereafter prescribed, to enter upon or remain within Zone B.

The designation of Military Area No. 2 as such does not contemplate any prohibition or regulation or restriction except with respect to the zones established therein.

5. Any Japanese, German, or Italian alien, or any person of Japanese Ancestry now resident in Military Area No. 1 who changes his place of habitual residence is hereby required to obtain and execute a "Change of Residence Notice" at any United States Post Office within the States of Washington, Oregon, California and Arizona. Such notice must be executed at any such Post Office not more than five nor less than one day prior to any such change of residence. Nothing contained herein shall be construed to affect the existing regulations of the U. S. Attorney General which require aliens of enemy nationalities to obtain travel permits from U. S. Attorneys and to notify the Federal Bureau of Investigation and the Commissioner of Immigration of any change in permanent address.

6. The designation of prohibited and restricted areas within the Western Defense Command by the Attorney General of the United States under the Proclamations of December 7 and 8, 1941, and the instructions, rules and regulations prescribed by him with respect to such prohibited and restricted areas, are hereby adopted and continued in full force and effect.

The duty and responsibility of the Federal Bureau of Investigation with respect to the investi-

gation of alleged acts of espionage and sabotage are not altered by this proclamation.

J. L. DEWITT,
Lieutenant General,
U. S. Army, Commanding.

Confirmed:
J. A. ULIO,
Major General,
The Adjutant General.

(F. R. Doc. 42-2601; Filed, March 25, 1942; 11:54 A. M.)

Public Proclamation No. 2, 7 F. R. 2405

WAR DEPARTMENT

(Public Proclamation No. 2)

Headquarters Western Defense Command and Fourth Army Presidio of San Francisco, California

ESTABLISHMENT OF MILITARY AREAS 3, 4, 5, AND 6

MARCH 16, 1942.

To: The people within the States of Washington, Oregon, California, Montana, Idaho, Nevada, Utah and Arizona, and the Public Generally.

Whereas by virtue of orders issued by the War Department on December 11, 1941, that portion of the United States lying within the States of Washington, Oregon, California, Montana,

Idaho, Nevada, Utah and Arizona and the Territory of Alaska has been established as the Western Defense Command and designated as a Theatre of Operations under my command; and

Whereas by Executive Order No. 9066, dated February 19, 1942, the President of the United States authorized and directed the Secretary of War and the Military Commanders whom he may from time to time designate, whenever he or any such designated commander deems such action necessary or desirable, to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded, and with respect to which the right of any persons to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion; and

Whereas the Secretary of War on February 20, 1942, designated the undersigned as the Military Commander to carry out the duties and responsibilities imposed by said Executive Order for that portion of the United States embraced in the Western Defense Command; and

Whereas the Western Defense Command by its geographical location is particularly subject to attack, to attempted invasion by the armed forces of nations with which the United States is now at war, and, in connection therewith, is subject to espionage and acts of sabotage, thereby requiring the adoption of military measures necessary to establish safeguards against such enemy operations:

Now therefore, I, J. L. DeWitt, Lieutenant General, U. S. Army, by virtue of the authority vested in me by the President of the United States and by the Secretary of War and my powers and prerogatives as Commanding General of the Western Defense Command, do hereby declare that:

1. The present situation requires as a matter of military necessity the establishment in the territory embraced by the Western Defense Command of Military Areas and Zones in addition to those established in Public Proclamation No. 1, this headquarters, dated March 2, 1942.

2. Pursuant to the determination and statement of military necessity in paragraph 1 hereof, there are hereby designated and established the following Military Areas:

Military Area No. 3, embracing the entire State of Idaho.

Military Area No. 4, embracing the entire State of Montana.

Military Area No. 5, embracing the entire State of Nevada.

Military Area No. 6, embracing the entire State of Utah.

3. Within Military Areas Nos. 1 and 2 as designated and established in Public Proclamation No. 1, above mentioned, and within Military Areas Nos. 3, 4, 5 and 6, as defined herein, there are hereby established, pursuant to paragraph 1 hereof, Zones A–100 to A–1033, inclusive, all as more particularly described and defined in Exhibit 1,

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hereto attached, and as generally shown on the maps attached hereto and marked Exhibits 2, 3, 4, 5, 6, 7, 8 and 9.

4. Such persons or classes of persons as the situation may require will by subsequent proclamation be excluded from Zones A–100 to A–1033, inclusive.

The designation of Military Areas Nos. 3, 4, 5, and 6 as such does not contemplate any prohibition, regulation or restriction except with respect to the Zones established therein, and except as provided in paragraph 5 hereof.

5. Any Japanese, German, or Italian alien, or any person of Japanese ancestry now resident in the states of the Western Defense Command, namely, Washington, Oregon, California, Montana, Idaho, Nevada, Utah and Arizona, who changes his place of habitual residence is hereby required to obtain and execute a "Change of Residence Notice" at any United States Post Office within any of the states mentioned. Such notice must be executed at any such Post Office not more than five nor less than one day prior to any such change of residence. Nothing contained herein shall be construed to affect the existing regulations of the U. S. Attorney General which require aliens of enemy nationalities to obtain travel permits from U. S. Attorneys and to notify the Federal Bureau of Investigation and the Commissioner of Immigration of any change in permanent address.

6. The duty and responsibility of the Federal Bureau of Investigation with respect to the in-

vestigation of alleged acts of espionage and sabotage are not altered by this proclamation.

J. L. DEWITT,
Lieutenant General,
U. S. Army, Commanding.

Confirmed:
J. A. ULIO,
Major General,
The Adjutant General.

(F. R. Doc. 42-2673; Filed, March 27, 1942; 10:29 A. M.)

Public Proclamation No. 3, 7 F. R. 2543

WAR DEPARTMENT

(Public Proclamation No. 3)

Headquarters Western Defense Command and Fourth Army Presidio of San Francisco, California

CONDUCT OF ENEMY ALIENS IN MILITARY AREAS

MARCH 24, 1942.

To: The people within the States of Washington, Oregon, California, Montana, Idaho, Nevada, Utah and Arizona, and the Public Generally.

Whereas by Public Proclamation No. 1, dated March 2, 1942, this headquarters, there were designated and established Military Areas Nos. 1 and 2 and Zones thereof, and

Whereas by Public Proclamation No. 2 dated March 16, 1942, this headquarters, there were des-

ignated and established Military Areas Nos. 3, 4, 5 and 6 and Zones thereof, and

Whereas the present situation within these Military Areas and Zones requires as a matter of military necessity the establishment of certain regulations pertaining to all enemy aliens and all persons of Japanese ancestry within said Military Areas and Zones thereof;

Now, therefore, I, J. L. DeWitt, Lieutenant General, U. S. Army, by virtue of the authority vested in me by the President of the United States and by the Secretary of War and my powers and prerogatives as Commanding General, Western Defense Command, do hereby declare and establish the following regulations covering the conduct to be observed by all alien Japanese, all alien Germans, all alien Italians, and all persons of Japanese ancestry residing or being within the Military Areas above described, or such portions thereof as are hereinafter mentioned:

1. From and after 6:00 A. M., March 27, 1942, all alien Japanese, all alien Germans, all alien Italians, and all persons of Japanese ancestry residing or being within the geographical limits of Military Area No. 1, or within any of the Zones established within Military Area No. 2, as those areas are defined and described in Public Proclamation No. 1, dated March 2, 1942, this headquarters, or within the geographical limits of the designated Zones established within Military Areas Nos. 3, 4, 5, and 6, as those areas are defined and described in Public Proclamation No. 2, dated March 16, 1942, this headquarters, or

within any of such additional Zones as may hereafter be similarly designated and defined, shall be within their place of residence between the hours of 8:00 P. M. and 6:00 A. M., which period is hereinafter referred to as the hours of curfew.

2. At all other times all such persons shall be only at their place of residence or employment or traveling between those places or within a distance of not more than five miles from their place of residence.

3. Nothing in paragraph 2 shall be construed to prohibit any of the above specified persons from visiting the nearest United States Post Office, United States Employment Service Office, or office operated or maintained by the Wartime Civil Control Administration, for the purpose of transacting any business or the making of any arrangements reasonably necessary to accomplish evacuation; nor be construed to prohibit travel under duly issued change of residence notice and travel permit provided for in paragraph 5 of Public Proclamations Numbers 1 and 2. Travel performed in change of residence to a place outside the prohibited and restricted areas may be performed without regard to curfew hours.

4. Any person violating these regulations will be subject to immediate exclusion from the Military Areas and Zones specified in paragraph 1 and to the criminal penalties provided by Public Law No. 503, 77th Congress, approved March 21, 1942, entitled: "An Act to Provide a Penalty for Violation of Restrictions or Orders with Respect to Persons Entering, Remaining in, Leaving or Committing Any Act in Military Areas or Zones."

In the case of any alien enemy, such person will in addition be subject to immediate apprehension and internment.

5. By subsequent proclamation or order there will be prescribed those classes of persons who will be entitled to apply for exemptions from exclusion orders hereafter to be issued. Persons granted such exemption will likewise and at the same time also be exempted from the operation of the curfew regulations of this proclamation.

6. After March 31, 1942, no person of Japanese ancestry shall have in his possession or use or operate at any time or place within any of the Military Areas 1 to 6 inclusive, as established and defined in Public Proclamations Nos. 1 and 2, above mentioned, any of the following items:

(a) Firearms.

(b) Weapons or implements of war or component parts thereof.

(c) Ammunition.

(d) Bombs.

(e) Explosives or the component parts thereof.

(f) Short-wave radio receiving sets having a frequency of 1750 kilocycles or greater or of 540 kilocycles or less.

(g) Radio transmitting sets.

(h) Signal devices.

(i) Codes or ciphers.

(j) Cameras.

Any such person found in possession of any of the above-named items in violation of the foregoing

will be subject to the criminal penalties provided by Public Law 503, 77th Congress, approved March 21, 1942, entitled: "An Act to Provide a Penalty for Violation of Restrictions or Orders with Respect to Persons Entering, Remaining in, Leaving or Committing Any Act in Military Areas or Zone."

7. The regulations herein prescribed with reference to the observance of curfew hours by enemy aliens, are substituted for and supersede the regulations of the United States Attorney General heretofore in force in certain limited areas. All curfew exemptions heretofore granted by the United States Attorneys are hereby revoked effective as of 6:00 a. m., PWT, March 27, 1942.

8. The Federal Bureau of Investigation is designated as the agency to enforce the foregoing provisions. It is requested that the civil police within the states affected by this Proclamation assist the Federal Bureau of Investigation by reporting to it the names and addresses of all persons believed to have violated these regulations.

J. L. DeWitt,
Lieutenant General,
U. S. Army, Commanding.

Confirmed:
J. A. Ulio,
Major General,
The Adjutant General.

(F. R. Doc. 42–2880; Filed, April 1, 1942; 10:19 a. m.)

Headquarters Western Defense Command and Fourth Army, Presidio of San Francisco, California

PUBLIC PROCLAMATION No. 4

MARCH 27, 1942.

To: The people within the States of Washington, Oregon, California, Montana, Idaho, Nevada, Utah and Arizona, and the Public Generally:

WHEREAS, By Public Proclamation No. 1, dated March 2, 1942, this headquarters, there was designated and established Military Area No. 1, and

WHEREAS, It is necessary, in order to provide for the welfare and to insure the orderly evacuation and resettlement of Japanese voluntarily migrating from Military Area No. 1, to restrict and regulate such migration:

NOW, THEREFORE, I, J. L. DEWITT, Lieutenant General, U. S. Army, by virtue of the authority vested in me by the President of the United States and by the Secretary of War and my powers and prerogatives as Commanding General, Western Defense Command, do hereby declare that the present situation requires as a matter of military necessity that, commencing at 12:00 midnight, P. W. T., March 29, 1942, all alien Japanese and persons of Japanese ancestry who are within the limits of Military Area No. 1, be and they are hereby prohibited from leaving that area for any purpose until and to the extent that a future proclamation or order of this headquarters shall so permit or direct.

Any person violating this proclamation will be subject to the criminal penalties provided by Public Law No. 503, 77th Congress, approved March 21, 1942, entitled: "An Act to Provide a Penalty for Violation of Restrictions or Orders with Respect to Persons Entering, Remaining in, Leaving or Committing Any Act in Military Areas or Zones." In the case of any alien enemy, such person will in addition be subject to immediate apprehension and internment.

J. L. DeWitt,
Lieutenant General,
U. S. Army, Commanding.

Headquarters Western Defense Command and Fourth Army, Presidio of San Francisco, California

PUBLIC PROCLAMATION NO. 8

JUNE 27, 1942.

To: The people within the States of Washington, Oregon, California, Montana, Idaho, Nevada, Utah and Arizona, and the Public Generally:

WHEREAS, By Public Proclamation No. 1, dated March 2, 1942, this headquarters, there were designated and established Military Areas Nos. 1 and 2, and by Public Proclamation No. 2, dated March 16, 1942, this headquarters, there were designated and established Military Areas Nos. 3, 4, 5 and 6, and

WHEREAS, The present situation within these military areas requires as a matter of military ne-

cessity that persons of Japanese ancestry who have been evacuated from certain regions within Military Areas Nos. 1 and 2 shall be removed to Relocation Centers for their relocation, maintenance and supervision and that such Relocation Centers be designated as War Relocation Project Areas, and that appropriate restrictions with respect to the rights of all such persons of Japanese ancestry, both alien and non-alien, so evacuated to such Relocation Centers, and of all other persons to enter, remain in, or leave such areas be promulgated;

NOW, THEREFORE, I, J. L. DEWITT, Lieutenant General, U. S. Army, by virtue of the authority vested in me by the President of the United States and by the Secretary of War and my powers and prerogatives as Commanding General of the Western Defense Command, do hereby declare that:

1. Pursuant to the determination of military necessity hereinbefore set out, all the territory included within the exterior boundaries of each Relocation Center now or hereafter established within the Western Defense Command, as such boundaries are designated and defined by orders subsequently issued by this headquarters, are hereby designated and established as War Relocation Project Areas.

2. All persons of Japanese ancestry, both alien and non-alien, who now or shall hereafter be or reside, pursuant to exclusion orders and instructions from this headquarters, or otherwise, within the bounds of any established War Relocation Project Area are required to remain within the bounds of such War Relocation Project Area at

all times unless specifically authorized to leave as set forth in Paragraph 3 hereof.

3. Any person of Japanese ancestry, both alien and non-alien, who shall now or hereafter so be or reside within any such War Relocation Project Area shall, before leaving said Area, obtain a written authorization executed by or pursuant to the express authority of this headquarters setting forth the effective period of said authorization and the terms and conditions upon and purposes for which it has been granted.

4. No persons other than the persons of Japanese ancestry described in Paragraph 2 hereof, and other than persons employed by the War Relocation Authority established by Executive Order No. 9102, dated March 18, 1942, shall enter any such War Relocation Project Area except upon written authorization executed by or pursuant to the express authority of this headquarters first obtained, which said authorization shall set forth the effective period thereof and the terms and conditions upon and purposes for which it has been granted.

5. Failure of persons subject to the provisions of this Public Proclamation No. 8 to conform to the terms and provisions thereof shall subject such persons to the penalties provided by Public Law No. 503, 77th Congress, approved March 21, 1942, entitled "An Act to Provide a Penalty for Violation of Restrictions or Orders with Respect to Persons Entering, Remaining in, Leaving, or Committing any Act in Military Areas or Zones".

J. L. DeWitt,
Lieutenant General,
U. S. Army, Commanding.

Headquarters Western Defense Command and Fourth Army, Presidio of San Francisco, California

MARCH 24, 1942.

CIVILIAN EXCLUSION ORDER NO. 1

1. Pursuant to the provisions of Public Proclamations Nos. 1 and 2, this headquarters, dated March 2, 1942, and March 16, 1942, respectively, it is hereby ordered that all persons of Japanese ancestry, including aliens and non-aliens, be excluded from that portion of Military Area No. 1, described as "Bainbridge Island," in the State of Washington, on or before 12 o'clock noon, P. W. T., of the 30th day of March, 1942.

2. Such exclusion will be accomplished in the following manner:

(a) Such persons may, with permission, on or prior to March 29, 1942, proceed to any approved place of their choosing beyond the limits of Military Area No. 1 and the prohibited zones established by said proclamations or hereafter similarly established, subject only to such regulations as to travel and change of residence as are now or may hereafter be prescribed by this headquarters and by the United States Attorney General. Persons affected hereby will not be permitted to take up residence or remain within the region designated as Military Area No. 1 or the prohibited zones heretofore or hereafter established. Persons affected hereby are required on leaving or entering Bainbridge Island to register and obtain

a permit at the Civil Control Office to be established on said Island at or near the ferryboat landing.

(b) On March 30, 1942, all such persons who have not removed themselves from Bainbridge Island in accordance with Paragraph 1 hereof shall, in accordance with instructions of the Commanding General, Northwestern Sector, report to the Civil Control Office referred to above on Bainbridge Island for evacuation in such manner and to such place or places as shall then be prescribed.

(c) A responsible member of each family affected by this order and each individual living alone so affected will report to the Civil Control Office described above between 8 a. m. and 5 p. m. Wednesday, March 25, 1942.

3. Any person affected by this order who fails to comply with any of its provisions or who is found on Bainbridge Island after 12 o'clock noon, P. W. T., of March 30, 1942, will be subject to the criminal penalties provided by Public Law No. 503, 77th Congress, approved March 21, 1942, entitled "An Act to Provide a Penalty for Violation of Restrictions or Orders With Respect to Persons Entering, Remaining in, Leaving, or Committing Any Act in Military Areas or Zone," and alien Japanese will be subject to immediate apprehension and internment.

J. L. DeWitt,
Lieutenant General,
U. S. Army, Commanding.

Western Defense Command and Fourth Army
Wartime Civil Control Administration

Instructions to All Japanese Living on Bainbridge Island

All Japanese persons, both alien and non-alien, will be evacuated from this area by twelve noon Monday, March 30, 1942.

No Japanese person will be permitted to leave or enter Bainbridge Island after 9:00 a. m. March 24, 1942, without obtaining special permission from the Civil Control Office established on this island near the ferry boat landing at the Anderson Dock Store in Winslow.

The Civil Control Office is equipped to assist the Japanese population affected by this evacuation in the following ways:

1. Give advice and instructions on the evacuation.

2. Provide services with respect to the management, leasing, sale, storage or other disposition of most kinds of property, including: farms, livestock and farm equipment, boats, tools, household goods, automobiles, etc.

3. Provide temporary residence for all Japanese in family groups, elsewhere.

4. Transport persons and a limited amount of clothing and equipment to their new residence, as specified below.

5. Give medical examinations and make provision for all invalided persons affected by the evacuation order.

6. Give special permission to individuals and families who are able to leave the area and pro-

ceed to an approved destination of their own choosing on or prior to March 29, 1942.

The following instructions must be observed:

1. A responsible member of each family, preferably the head of the family, or the person in whose name most of the property is held, and each individual living alone, will report to the Civil Control Office to receive further instruction. This must be done between 8:00 a. m. and 5:00 p. m. Wednesday, March 25, 1942.

2. Before leaving the area all persons will be given a medical examination. For this purpose all members of the family should be present at the same time, when directed by the Civil Control Office.

3. Under special conditions, individuals and families will be permitted to leave the area prior to the date for complete evacuation indicated above. In general, the conditions imposed on voluntary evacuation are as follows: (a) That the destination be outside of Military Area No. 1, prescribed by Proclamation No. 1 of the Commanding General, Western Defense Command and Fourth Army, March 2, 1942; (b) That arrangements have been made for employment and shelter at the destination.

4. Provisions have been made to give temporary residence in a reception center elsewhere. Evacuees who do not go to an approved destination of their own choice, but who go to a reception center under Government supervision, must carry with them the following property, not exceeding that which can be carried by the family or the individual:

(a) Blankets and linens for each member of the family;

(b) Toilet articles for each member of the family;

(c) Clothing for each member of the family;

(d) Sufficient knives, forks, spoons, plates, bowls and cups for each member of the family;

(e) All items carried will be securely packaged, tied and plainly marked with the name of the owner and numbered in accordance with instructions received at the Civil Control Office;

(f) No contraband items may be carried.

5. The United States Government through its agencies will provide for the storage at the sole risk of the owner of only the more substantial household items, such as iceboxes, washing machines, pianos and other heavy furniture. Cooking utensils and other small items must be crated, packed and plainly marked, with the name and address of the owner. Only one name and address will be used by a given family.

6. Each family, and individual living alone, who goes to a reception center will be furnished transportation and food for the trip. Transportation by private means will not be permitted. Instructions will be given by the Civil Control Office as to when evacuees must be fully prepared to travel.

Go to the Civil Control Office at the Anderson Dock Store in Winslow between 8:00 A. M. and 5:00 P. M. on March 25, 1942, to receive further instructions.

J. L. DeWitt,

Lieutenant General, U. S. Army, Commanding.

Civilian Exclusion Order No. 57, 7 F. R. 3725

War Department

(Civilian Exclusion Order No. 57)

Headquarters Western Defense Command and Fourth Army, Presidio of San Francisco, California

Persons of Japanese Ancestry Excluded from Restricted Area King County, Washington

May 10, 1942.

1. Pursuant to the provisions of Public Proclamations Nos. 1 and 2, this Headquarters, dated March 2, 1942, and March 16, 1942, respectively, it is hereby ordered that from and after 12 o'clock noon, P. W. T., of Saturday, May 16, 1942, all persons of Japanese ancestry, both alien and non-alien, be excluded from that portion of Military Area No. 1 described as follows:

All that portion of the County of King, State of Washington, within the boundary beginning at the intersection of Roosevelt Way and East Eighty-fifth Street; thence easterly along East Eighty-fifth Street and East Eighty-fifth Street extended to Lake Washington; thence southerly along the shoreline of Lake Washington to the point at which Yesler Way meets Lake Washington; thence westerly along Yesler Way to Fifteenth Avenue; thence northerly on Fifteenth Avenue to East Madison Street; thence southwesterly on East Madison Street to Fifth Avenue; thence northwesterly along Fifth Avenue to Westlake Avenue; thence northerly along Westlake Avenue to Vir-

ginia Street; thence northeasterly along Virginia Street to Fairview Avenue North; thence northerly along Fairview Avenue North to Eastlake Avenue; thence northerly along Eastlake Avenue to Roosevelt Way; thence northerly along Roosevelt Way to the point of beginning.

2. A responsible member of each family, and each individual living alone, in the above described area will report between the hours of 8:00 A. M. and 5:00 P. M., Monday, May 11, 1942, or during the same hours on Tuesday, May 12, 1942, to the Civil Control Station located at Christian Youth Center, 2203 East Madison Street, Seattle, Washington.

3. Any person subject to this order who fails to comply with any of its provisions or with the provisions of published instructions pertaining hereto or who is found in the above area after 12 o'clock noon, P. W. T., of Saturday, May 16, 1942, will be liable to the criminal penalties provided by Public Law No. 503, 77th Congress, approved March 21, 1942, entitled "An Act to Provide a Penalty for Violation of Restrictions or Orders with Respect to Persons Entering, Remaining in, Leaving or Committing any Act in Military Areas or Zones," and alien Japanese will be subject to immediate apprehension and internment.

4. All persons within the bounds of an established Assembly Center pursuant to instructions from this Headquarters are excepted from the provisions of this order while those persons are in such Assembly Center.

J. L. DeWitt,
Lieutenant General,
U. S. Army Commanding.

(Instructions published with Civilian Exclusion Order No. 57)

Western Defense Command and Fourth Army
Wartime Civil Control Administration, Presidio
of San Francisco, California

INSTRUCTIONS TO ALL PERSONS OF JAPANESE ANCESTRY

Living in the following area: All that portion of the County of King, State of Washington, within the boundary beginning at the intersection of Roosevelt Way and East Eighty-fifth Street; thence easterly along East Eighty-fifth Street and East Eighthy-fifth Street extended to Lake Washington; thence southerly along the shoreline of Lake Washington to the point at which Yesler Way meets Lake Washington; thence westerly along Yesler Way to Fifteenth Avenue; thence northerly on Fifteenth Avenue to East Madison Street; thence southwesterly on East Madison Street to Fifth Avenue; thence northwesterly along Fifth Avenue to Westlake Avenue; thence northerly along Westlake Avenue to Virginia Street; thence northeasterly along Virginia Street to Fairview Avenue North; thence northerly along Fairview Avenue North to Eastlake Avenue; thence northerly along Eastlake Avenue to Roosevelt Way; thence northerly along Roosevelt Way to the point of beginning.

Pursuant to the provisions of Civilian Exclusion Order No. 57, this Headquarters, dated May 10,

1942, all persons of Japanese ancestry, both alien and non-alien, will be evacuated from the above area by 12 o'clock noon, P. W. T., Saturday, May 16, 1942.

No Japanese person living in the above area will be permitted to change residence after 12 o'clock noon, P. W. T., Sunday, May 10, 1942, without obtaining special permission from the representative of the Commanding General, Northwestern Sector, at the Civil Control Station located at: Christian Youth Center, 2203 East Madison Street, Seattle, Washington. Such permits will only be granted for the purpose of uniting members of a family, or in cases of grave emergency.

The Civil Control Station is equipped to assist the Japanese population affected by this evacuation in the following ways:

1. Give advice and instructions on the evacuation.

2. Provide services with respect to the manageagement, leasing, sale, storage or other disposition of most kinds of property, such as real estate, business and professional equipment, household goods, boats, automobiles and livestock.

3. Provide temporary residence elsewhere for all Japanese in family groups.

4. Transport persons and a limited amount of clothing and equipment to their new residence.

The following instructions must be observed:

1. A responsible member of each family, preferably the head of the family, or the person in whose name most of the property is held, and each

individual living alone, will report to the Civil Control Station to receive further instructions. This must be done between 8:00 A. M. and 5:00 P. M. on Monday, May 11, 1942, or between 8:00 A. M. and 5:00 P. M. on Tuesday, May 12, 1942.

2. Evacuees must carry with them on departure for the Assembly Center, the following property:

(a) Bedding and linens (no mattress) for each member of the family;

(b) Toilet articles for each member of the family;

(c) Extra clothing for each member of the family;

(d) Essential personal effects for each member of the family.

All items carried will be securely packaged, tied and plainly marked with the name of the owner and numbered in accordance with instructions obtained at the Civil Control Station. The size and number of packages is limited to that which can be carried by the individual or family group.

3. No pets of any kind will be permitted.

4. No personal items and no household goods will be shipped to the Assembly Center.

5. The United States Government through its agencies will provide for the storage, at the sole risk of the owner, of the more substantial household items, such as iceboxes, washing machines, pianos and other heavy furniture. Cooking utensils and other small items will be accepted for storage if crated, packed and plainly marked with the name and address of the owner. Only one name and address will be used by a given family.

6. Each family, and individual living alone, will be furnished transportation to the Assembly Center or will be authorized to travel by private automobile in a supervised group. All instructions pertaining to the movement will be obtained at the Civil Control Station.

Go to the Civil Control Station between the hours of 8:00 A. M. and 5:00 P. M., Monday, May 11, 1942, or between the hours of 8:00 A. M. and 5:00 P. M., Tuesday, May 12, 1942, to receive further instructions.

J. L. DeWITT,
Lieutenant General, U. S. Army, Commanding.

May 10, 1942.

See Civilian Exclusion Order No. 57.

U. S. GOVERNMENT PRINTING OFFICE: 1943

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

GORDON K. HIRABAYASHI
vs.
THE UNITED STATES OF AMERICA. } No. 870.

MINORU YASUI
vs.
THE UNITED STATES OF AMERICA. } No. 871.

BRIEF *AMICUS CURIAE*

JAPANESE AMERICAN CITIZENS LEAGUE,
Amicus Curiae.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

GORDON K. HIRABAYASHI *vs.* THE UNITED STATES OF AMERICA.	No. 870
MINORU YASUI *vs.* THE UNITED STATES OF AMERICA.	No. 871.

BRIEF *AMICUS CURIAE*

The interest of the Japanese American Citizens League.

The Japanese American Citizens League is a national organization of more than 20,000 loyal American citizens of Japanese ancestry in all parts of this country. Its membership includes all strata of Japanese American society and represents more than one-half of the estimated 35,000 American-born Japanese on the mainland who are 18 years of age or more. Its members are required to furnish proof of citizenship in addition to signing a special oath of allegiance to the United States.

It was formally organized to protect the interests of its members and of all loyal Japanese Americans in 1930, although a number of chapters existed during the previous

decade. It was incorporated in 1937. Its programs and its aims are sloganized: "For Better Americans in a Greater America".

Because of its consistent adherence to the principles of Americanism; its civic, social, and educational services to the Japanese community; and its cooperation with local, state, and federal officials, it has won general recognition from responsible government agencies and private organizations as the spokesman for loyal Americans of Japanese descent. Indeed, Galen M. Fisher, adviser to the Institute of Pacific Relations and secretary of the Committee on National Security and Fair Play, declared before the Tolan Committee in San Francisco: "In connection with the whole question of citizens of Japanese stock, I wish to testify to the great service to our Nation already rendered by the Japanese American Citizens League. It is the only inclusive organization touching the Nisei (American-born Japanese) and it can be of great value in maintaining their undivided loyalty to the United States".[1]

The thoroughly American spirit and purpose of the Citizens League are expressed in the Japanese American Creed, written by Mike Masaoka, National Secretary and Field Executive, many months before the outbreak of the war. It was fully endorsed by all members, read before the United States Senate, and printed in the Congressional Record, May 9, 1941.

This credo reads:

> "I am proud that I am an American Citizen of Japanese ancestry, for my very background makes me appreciate more fully the wonderful advantages of this Nation. I believe in her institutions, ideals, and traditions; I glory in her heritage; I boast of her history; I trust in her future * * *.

1. Hearing before Select Committee investigating National Defense Migration, House of Representatives, 77th Congress, Second Session, Part 29, San Francisco Hearings, p. 11,200.

"Although some individuals may discriminate against me, I shall never become bitter or lose faith for I know that such persons are not representative of the majority of the American people. True, I shall do all in my power to discourage such practices, but I shall do it in the American way—above board, in the open, through courts of law, by education, by proving myself to be worthy of equal treatment and consideration. I am firm in my belief that American sportsmanship and attitude of fair play will judge citizenship and patriotism on the basis of action and achievement, and not on the basis of physical characteristics.

"Because I believe in America, and I trust she believes in me, and because I have received innumerable benefits from her, I pledge myself to do honor to her at all times and in all places; to support her Constitution; to obey her laws; to respect her flag; to defend her against all enemies, foreign or domestic; to actively assume my duties and obligations as a citizen, cheerfully and without any reservations whatsoever, in the hope that I may become a better American in a greater America."

The undeviating policy of the National Japanese American Citizens League in opposition to the Axis aggressors is a clear and open record.

In calling for fair play toward loyal Japanese, a citizens committee on the Pacific Coast, headed by General David P. Barrows, Monroe E. Deutsch, Robert Gordon Sproul, and Ray Lyman Wilbur, circularized a letter December 29, 1941, reading in part:

"The Japanese American Citizens League, consisting of some 8,000 citizens of Japanese ancestry (in the San Francisco Bay area), has made repeated pronouncements of loyalty to the United States and of opposition to the aggressive policies of Japan. * * * Many such Japanese have encouraged

> their sons to enter the United States armed forces and have subscribed to Defense Bonds.
>
> "We appeal to all our members and to all citizens who see this statement to make its contents widely known, and to cooperate actively in insuring fair play and security to all law-abiding Japanese residents."[2]

Upon the outbreak of war between the United States and Japan, Saburo Kido, national president, sent the following wire to President Roosevelt, a statement which received wide publicity through the newspapers and radio services:

> "The Japanese Americans are stunned and horrified at this morning's unwarranted attack by Japan upon American soil, our country.
>
> "We want to convey to you that we unequivocally condemn Japan for this unprecedented breach of good faith.
>
> "In behalf of our (then) 15,000 members in the (then) 56 chapters of our National Japanese American Citizens League, we unreservedly volunteer the facilities of our office to the defense of our land against this attack.
>
> "In this solemn hour we pledge our fullest cooperation to you, Mr. President, and to our country.
>
> "We appreciate the efforts you have made to preserve peace in the Pacific, but now that Japan has instituted this attack upon our land, we are ready and prepared to expend every effort to repel this invasion together with our fellow Americans."

Every chapter ratified their president's declarations by special action. The Northern California District Council, one of the major organizational subdivisions of the National, for example, unanimously adopted and forwarded this resolution:

---

2. Tolan Committee Reports, San Francisco hearings, p. 11,200.

"To the President and the Congress of the United States of America:

"Greetings:

"Whereas, we American citizens of Japanese ancestry, appreciative of our priceless heritage of American traditions and ideals of liberty, fair play, and sportsmanship, do unanimously condemn the infamous and perfidious attack of the Imperial Japanese Government upon our American soil; and

"Whereas, it is the sacred privilege of every American, regardless of race, color, and national origin, to uphold our country in our lives and with our lives against those dogmas of might, treachery, and the annihilation of those truths we hold so dear;

"Now, therefore, be it resolved by the unanimous action of the 27 chapters of the Northern California District Council of the Japanese American Citizens League, convened in special session in San Francisco, California, this 21st day of December, 1941, that we do hereby urge and direct every American citizen of Japanese extraction to volunteer for the military and the civilian defense of our beloved land;

"To purchase United States Defense Bonds and Stamps to help finance the defeat of the Axis powers;

"To cooperate with the Federal Bureau of Investigation, the Navy and Army Intelligence services, and every other constituted agency in the ferreting out of subversive and inimical activities and elements;

"To support the state and local government officials and organizations in their efforts to preserve law and order;

"To participate in the Red Cross, Community Chest, and other social service agencies dedicated to the furtherance of the common welfare;

"To conserve as well as to promote the production of those vital materials necessary to the national defense;

"To do everything possible to insure the complete and ultimate victory of freedom's forces over those of greed, hate, and tyranny;

"That we do hereby offer, unreservedly, our organizational and individual services and facilities to our government in any capacity which they may deem necessary and proper; and

"That we do hereby pledge 'our lives, our fortunes, and our sacred honor' to the end that government 'of the people, by the people, and for the people shall not perish from the earth'."

That the character of this association is recognized by Brigadier General Lewis B. Hershey, Director of the Selective Service, is evidenced by this message sent to the League shortly after the present conflict began:

"I note with pleasure that your organization, the Japanese American Citizens League, has banded together some (then) 15,000 young American citizens of Japanese ancestry to promote that spirit of patriotic cooperation—that your motto is: 'Better Americans in a Greater America', and your purpose is 'to stand behind your country, the United States of America, throughout any and every emergency'.

"Such concerted activity in the present emergency confronting our Nation is noble and needed; and it is highly gratifying to me, as Director of the Selective Service System which is recruiting the young manhood of America for National Defense, to have this opportunity to commend and encourage it."

The continuing efforts of the Japanese American Citizens League to support the government in the present

struggle have received recurrent recognition from official sources. To cite one instance: On February 6, 1942, Mr. Wayne Coy, Special Assistant to the President, wrote to Mr. Masaoka:

> "The President has asked me to express his appreciation of the action of the Japanese American Citizens League in pledging support and assistance during the present emergency. Such assurances of cooperation are most gratifying to him."

When the War Department prevented Americans of Japanese ancestry from participating in the armed forces, either under Selective Service or by way of enlistment, the Japanese American Citizens League in a formal resolution adopted at a special emergency conference convened in Salt Lake City, November 17, 1942, expressed the belief that their welfare and their destiny "are inextricably bound up in the welfare and the destiny of these United States of America" and insisted upon the right "to contribute (their) share to the winning of the war" by offering their services and their lives. And it must be mentioned in passing that this declaration of faith was unanimously adopted when most of the delegates were from the government-sponsored Relocation Centers.

As a result of these efforts, the War Department and the Selective Service System finally made provisions for services in the armed forces.[3]

The decision of this Court in the instant cases will not only affect the liberties of the two American citizens of Japanese ancestry, whose rights are at issue before

3. The first to volunteer for service in the specially created Japanese American Combat Team was Mike Masaoka, Secretary of the J.A.C.L.
The reasons for his volunteering for service in the U. S. Army was stated by him in the Pacific Citizen, official publication of the J.A.C.L. of February 4, 1943 and are set forth in appendix (A) hereto annexed.

this bar, but it will also equally affect the freedom of 80,000 American citizens of Japanese descent, 20,000 of whom are members of this organization.

Perhaps, at this point, the position of the Japanese American Citizens League ought to be stated, particularly in view of the leadership which it assumed in this whole issue.

Even though the National Council, the representative policy-making assembly of the League with delegates from every chapter, unanimously agreed to cooperate in the evacuation process, it did not then, and does not now, concede the legality or constitutionality of this unprecedented action. This momentous decision was made because the military requested cooperation; this cooperation was made subject to the final decision of the Courts. And as loyal Americans, and true to their pledges to their government, the Japanese American Citizens League did cooperate in what Edward J. Ennis, Director of the Alien Enemy Control Unit, Department of Justice, before the luncheon meeting of the Annual Conference of the National Council of Naturalization and Citizenship at the Hotel Roosevelt in New York City, February 5, 1943, is reported to have said: "No other group of people in the history of the United States have ever been called upon to make a greater sacrifice for their country, and none responded more nobly".

Milton S. Eisenhower, then the director of War Relocation Authority, which was the civilian agency to aid the evacuees, and the present associate director of the Office of War Information, bore eloquent testimony to the part which the League played in aiding the government when he declared, before a Congressional Hearing on appropriations in Washington, D. C., June 15, 1942, in answering the question as to whether the Japanese had cooperated in the evacuation:

> "Remarkably cooperative. For example, the Japanese American citizens have an organization called the Japanese American Citizens League, and it has carried on a most vigorous educational program among the total population, urging 100 per cent cooperation.
>
> "In fact, I just cannot say things too favorable about the way they have cooperated under the most adverse circumstances".

That that cooperation was valuable to the government and demonstrated a far greater degree of genuine loyalty than any arbitrary test could ever show is undeniable. Now, that the military phase of that exclusion is completed and evacuation is a *fait accompli,* the members of the Japanese American Citizens League, recalling their lessons in the intrinsic value of American citizenship, await the decision of this Court with confidence in American justice.

But the concern of the Japanese American Citizens League is not alone for its members, nor even for the remaining 60,000 American citizens who along with the members of this organization have been deported from their homes and imprisoned in dentention camps, or relocation centers as they are termed, solely because of their race or ancestry. Its concern is for all the minority racial groups in this country who may be the next victims of similar discrimination resulting from war or other prejudices and hysterias, and for the preservation of civil rights for all, unless this Court calls an immediate halt to the arbitrary and discriminatory treatment meted out to the 80,000 American citizens of Japanese ancestry—the most defenseless and most misunderstood group of citizens in our land today.

ARGUMENT

THE MILITARY ORDERS AIMED ONLY AGAINST, AND AFFECTING ONLY, AMERICAN CITIZENS OF A PARTICULAR RACE OR ANCESTRY VIOLATE THE MINIMUM REQUIREMENTS OF EQUALITY INHERENT IN DUE PROCESS OF LAW.

While the Fifth Amendment, unlike the Fourteenth, contains no express "equal protection" guarantee, its "due process" clause assures a minimum quantum of equality of treatment, and constitutes a substantial and adequate protection from discrimination because of race, nationality or ancestry.

The relationship of due process and the equal protection of the laws is summarized in *Truax* v. *Corrigan*, 257 U. S. 312, 331. Said the court:

> "It (due process of law) of course tends to secure equality of law in the sense that it makes a required minimum of protection for everyone's right of life, liberty and property, which the Congress or the legislature may not withhold. Our whole system of law is predicated on the general fundamental principle of equality of application of the law, 'All men are equal before the law;' 'This is a government of laws, and not of men;' 'No man is above the law,' * * * are all maxims showing the spirit in which legislatures, executives, and courts are expected to make, execute, and apply laws."

In *Truax* v. *Corrigan*, the court says the following of *Yick Wo* v. *Hopkins*:

> "Mr. Justice Mathews, in *Yick Wo* v. *Hopkins*, 118 U. S. 356, 369, * * * speaking for the court of both the *due process* and *equality* clause of the 14th Amendment said:

> "'These provisions are universal in their application, to all persons within the territorial jurisdiction, *without regard to any difference of race,* of color, or of *nationality;* and the equal protection of the laws is a pledge of the protection of equal laws.'
>
> "The accuracy and comprehensive felicity of this description of the effect of the equality clause are shown by the frequency with which it has been quoted in the decisions of this court * * *."

Similarly, in *Yu Cong Eng* v. *Trinidad,* 271 U. S. 500, 528, in annulling a Philippine statute, apparently aimed at the Chinese, the court held it to be a denial of the equal protection of the laws; and accordingly a denial also of due process.

So, in *U. S.* v. *Yount,* 267 Fed. 861, 863 (E. D. Pa.), it was said:

> "It seems reasonably clear that the 'due process of law' provision of the Fifth Amendment is broad enough in its scope and purpose to include the 'equal protection of the laws' which no state may deny to any person under the provisions of the Fourteenth Amendment."

The court concluded:

> "But the Supreme Court has reminded us that 'No duty rests more imperatively upon the court than the enforcement of those constitutional provisions intended to secure that *equality of rights* which is the foundation of free government."

Compare also Justice Jackson in *Edwards* v. *California,* 314 U. S. 160, to the effect that race is a constitutional irrelevance. "The mere state of being without funds is a constitutional irrelevance—like race, creed, or color."

To the same effect is *Skinner* v. *Oklahoma*, 316 U. S. 535, Chief Justice Stone concurring:

> "A law which condemns without hearing, all the individuals of a class to so harsh a measure (sterilization) as the present because some or even many merit condemnation, is lacking in the first principles of due process."

While construing the equal protection clause of the Fourteenth Amendment, and not the due process clause of the Fifth, the latest discussion of the subject by this court through Chief Justice Stone in *Hill* v. *Texas*, 316 U. S. 400, 406, is noteworthy:

> "Equal protection of the law is something more than an abstract right. It is a command which the State must respect, the benefit of which every person may demand. Not the least merit of our constitutional system is that its safeguards extend to all—the least deserving as well as the most virtuous."

1. There is no proof that those of Japanese ancestry are a more dangerous group than any other.

Our foes in this war have made a fetish of intolerance and race thinking. If we are successfully to organize a moral opposition to them and to retain advantage over them in the eyes of the world, we must remain free from any trace of their odious concepts and excesses. It is particularly important, in view of the character of this war and of our declared war aims, that the rights of minority groups and especially of groups which may differ in some physical traits from the mass of our citizenry be scrupulously protected. Therefore, if it should appear that evacuation which has cost both the government and the group affected so dearly in treasure and dignity, was

precipitated by rumor and misinformation and not by solid fact and need, the policy must be condemned and reversed with all dispatch.

It is not enough, consequently, to hide behind such adjectives such as "inscrutable" and "unassimilable" or to seek to create the impression of "military necessity" for discrimination against a group by the repetition of the phrase. What has been done is so grave a departure from the American tradition, so fraught with peril to the present and future of this nation, so dangerously close to Nazi parallels, that to justify it in any measure, it must be established by abundant evidence of the most convincing kind that those of Japanese ancestry formed a group much more dangerous to the national safety than any other. And such evidence cannot be found.

It is appalling to realize that the group which alarmists would have us believe endangered the security of the United States, and whose existence was said to necessitate a drastic move without precedent in American history numbered—men, women, children, citizens and aliens—only 126,947.[4] How insignificant this number is can be judged by the fact that resident nationals of another country with which we are at war, Hungary, number 116,000, and if the children of Hungary are included the figure is considerably increased.[5] Yet the Hungarians are considered so small a group that they are generally ignored, and it would cause only amusement to suggest that their numbers constitute a menace or that they must be gathered up in a military dragnet.

The total group of persons of Japanese ancestry, then, constituted less than one-tenth of one per cent of the population of the United States in 1940. In view of our

4. 16th Census of the United States, 1940.
5. *New York Times*, July 19, 1942.

mingled indignation and mirth when Herr Hitler declared that a certain one per cent of the population of Germany was capable of betraying and "stabbing in the back" the other 99 per cent of the inhabitants of the Reich, the insincerity and grim humor of the synthetic "fear" of Japanese residents and citizens of Japanese ancestry is patent.

Compared to the number of Germans in the United States, the Japanese form a tiny group. In 1940, there were 1,237,772 persons residing in the United States who were born in Germany. The census figures do not reveal how many second generation Germans there are, but the census bureau reported on June 12, 1942, that there were 2,435,700 individuals, native born of foreign or mixed parentage, and 925,040 native born of native parentage, to whom German is the mother tongue. This gives some measure of the number of second-generation and third-generation Germans who have retained their identification with German language and culture.[6] In 1940, there were still 314,105 German nationals in this country, though Germans, unlike Japanese, are allowed to be naturalized.

There are living in the states of California, Washington and Oregon 71,727, 15,470, and 9,883 persons respectively who were born in Germany. In California, where it has been claimed that one Japanese saboteur could deliver the nation to its enemies, there reside 19,422 German enemy aliens. In the city of Los Angeles, where the number of Japanese was alleged to menace security, there were in 1940, 17,528 residents who had been born in Germany and exactly 8,726 Japanese nationals.

The Italian element of the country and of the West Coast even more impressively dwarfed the population of Japanese descent. In 1940, the number of residents in the

6. *New York Times*, June 13, 1942.

United States who were Italian-born totaled 1,623,579, of which 690,551 or 42.53 per cent were Italian nationals. Of these foreign-born persons of Italian origin 100,911 lived in California and of these 51,923 or 51.45 per cent were aliens. In other words, not only was the absolute number of those born in Italy great, but in addition the assimilation process, if it can be judged by the desire to naturalize, was considerably below the national average in this region. Moreover, the concentration of those of Italian background in strategic or military areas was surprisingly great. In 1935, a study was made of the Italians of San Francisco, for instance, which revealed that there were in that city 27,311 individuals born in Italy and 30,710 American born children of Italian parentage.[7] According to this same inquiry, in the four adjoining counties of San Mateo, Marin, Alameda, and Contra Costa, there were 21,045 foreign-born Italians and 24,388 native-born of foreign or mixed parents, a total, in the words of the author, of "103,454 individuals who are more or less directly in contact with Italian mores and habits of mind."[8] Moreover, there was a definite concentration of Italians in enterprises which Japanese are so bitterly condemned for entering. To quote again:

> "Virtually every unit of the independent fishing fleet operation off the coast of California is owned and manned by [Italian] foreign-borns. That assertion is on authority of Mr. B., a leader of the San Francisco fishing colony, and reputed to know as much of the operation and ownership of fish boats and equipment as any person about the wharves.
>
> "Mr. B. knows only two American-born owners now in the fleet; and these inherited their boats

7. Paul Radin, *The Italians of San Francisco*, SERA Project 2-F2-98, 1935.

8. *Ibid.*, p. 38

> from Italian-born sires * * * More than 1,000 independent fish boats ply California waters * * * Counting shore men, at least 5,000 persons are employed by the fishing fleet. A majority of these are Italians."[9]

Nor was this Italian colony free from the influence of Fascist propaganda, as this excerpt indicates:

> "Pete, a patriarch of Hunter's Point, a fishing village off San Francisco, says he would like to return to Italy to see Mussolini. Everyone wants to see Mussolini. He's a great man."[10]

Let us suppose that organized economic or political pressure groups had wished to make capital of the numbers and population distribution of Italians and Germans on the West Coast. They could have insinuated that so many aliens could not have come into the region for any good reason. They could have drawn maps and diagrams to prove that San Francisco bay was surrounded by enemy sympathizers and that the Los Angeles City Hall was practically in the hands of the Gestapo. They could have pointed to the flourishing Italian language schools and to the circumstance that most Italians are Catholic in a prevailingly Protestant country as proof of unassimilability. They could have inflated the evidences of subversive activity which attached to the German and Italian consulates. They could have doubtless excited the public mind to the point where a call for protective custody could have been elicited. And this turn of events, though it would have been unnecessary, wicked and unjust as subsequent events have proved, would have been far more reasonable and logical than the treatment meted out to

9. *Ibid.*, p. 59.
10. *Ibid.*, p. 64.

those of Japanese ancestry. This is stated advisedly and emphatically, for in terms of size of population, and age and sex distribution, there is scarcely any group in this country as impotent and useless to a potential enemy as the Japanese of alien or American nationality.

In the first place, not only is the group extremely small in comparison to the total national population, but a relatively small percentage of it is foreign born. In 1940, 79,642 or 62.7 of those of Japanese ancestry were native-born and therefore American citizens, while only 47,305 or 37.3 were Japanese-born and therefore aliens. It must be remembered, too, that none of these aliens are recent comers with immediate roots in the country of their origin. Total exclusion of Japanese has been practiced since the Immigration Law of 1924. Even before that it was sharply restricted. Consequently, most of these aliens have been law abiding residents of this country for from 20 to 40 years and are technically aliens simply and solely because the privilege of naturalization has been withheld from them.

The fact that exclusion has been in force for so long suggests another important consideration about the alien minority, namely, age. Those who came in the beginning are now old. A constant flow of immigration would have provided a young and a middle-aged group. Instead, because of exclusion, the population masses at the extremes of youth and age. The alien males are in average about 59 years old;[11] their wives are little younger. Since these immigrants tended to marry late in life, after they were established economically, their children, the citizens of Japanese ancestry, are only now growing to maturity. In 1940, 39 percent of the citizen population was under 15 years of age. Of the total of 126,000 persons of

11. House Report No. 2124 (Tolan Committee Report), May 1942, p. 95.

Japanese ancestry, approximately 55,000 were females.[12] To a shocking degree the evacuation was the removal and detention of women, of men well above the age of military effectiveness who had given of their youth and strength in honest toil, and of bewildered and tearful children torn from their schools and normal associations. The senseless panic over this helpless minority becomes still more shameful when it is realized that out of the limited number of men of military age in the group, 5,000 were already in the armed forces of the United States,[13] a higher percentage of whom were volunteers than any other nationality group in this country.

It is proper and important to stress the accurate figures relating to the Japanese and American-Japanese population on the west coast because those who advocated evacuation were apparently under peculiar misapprehensions regarding this subject. To cite one instance: Senator Hiram Johnson, Chairman of the West Coast Congressional Delegation which asked the President to make evacuation possible, declared in Congress on February 17, 1942:[14] "We are not in any position to look upon the situation with equanimity. We cannot do so on the west coast. In the first place, we have 130,000 Japanese, 30,000 of whom are citizens * * *." At that time there were approximately 112,000 persons of Japanese ancestry on the west coast, of *whom 73,000 were citizens.* Senator Johnson's error is one of the milder distortions during the debates at that time. If those who pressed for evacuation and who were largely responsible for the policy acted upon such inadequate knowledge, the necessity and

12. *Ibid.*, p. 94.
13. This figure is given by the President, in his letter to Secretary of War, Feb. 1, 1943, regarding the organization of a Japanese American combat team in the U. S. Army.
14. Congressional Record, Feb. 17, 1942, p. 1371.

wisdom of the move may be justly criticized and sharply questioned.

When the unflattering history of this unpleasant episode is written, one of the elements which will particularly interest the investigator is that from the point of view of numbers, there was never less reason for harsh or repressive measures against those of Japanese ancestry than in the year 1942. In 1930, there were 138,834 persons of Japanese ancestry in the United States.[15] In 1940, there were 126,947 such persons, a drop of 11,887 or 8.6 in the decade. In California, where traditionally anti-oriental organizations successfully created the impression that a handful of citizens of other extractions were at the mercy of hordes of resident Japanese, those of Japanese ancestry shrank in number from 97,456 in 1930 to 93,717 in 1940. During this same period the total population of the state rose from 5,677,251 to 6,907,387, and by the spring of 1942, due to the tremendous influx of war workers, the disproportion between the number of those of Japanese descent and the general population total became even still greater. To those who say that the Japanese were dangerously concentrated on the west coast, the answer is that a large percentage of a small number is nevertheless a still smaller number. The fact is that the number of German aliens in the State of New York alone is greater than the number of those of Japanese ancestry in the entire United States. If, in spite of this, it was not deemed necessary to deal with Germans as a group at a time Nazi submarines were sinking our ships off the Atlantic coast at an alarming rate, when installations in the Carribean were being shelled, when saboteurs were being landed from enemy craft on our shores, it is hypo-

15. These figures and those which follow are from the 16th Census of the United States, 1940.

critical and reprehensible to single out a smaller and less powerful group as the national scape-goat.

2. No problem of dual nationality exists.

It has been repeatedly charged that the American citizens of Japanese ancestry are dual citizens, and therefore owe allegiance to Japan. There has been a deliberate attempt to create the impression that Japan has encouraged dual citizenship for some sinister purpose, and that Japan has developed some unique theory of dual citizenship not shared by other nations of the world. Few arguments were more influential in creating sentiment and demand for evacuation. This was a theme hammered into the national consciousness by every proponent of evacuation. Congressman Thomas F. Ford (Cal.), for example, declared on the floor of the House:

> "• • • there is what we call dual citizenship. Every child of Japanese parentage, born in the United States, according to the law of the Imperial Japanese government, is still a citizen of Japan. He cannot break that citizenship unless he goes personally to the Japanese consul and gets from him permission to denounce that citizenship. • • • I do not suppose one-tenth of 1 percent of the Japanese in the United States have taken this step. They are therefore all dual citizens of the United States. They should not be treated as citizens of the United States. They should be required to move away from strategic areas where they cannot bring about another Pearl Harbor. • • •"[16]

It is not enough merely to say that there is not one correct fact in this declaration. It must be remembered, in addition, that the author of these absurdities was a

16. Congressional Record, February 18, 1942, p. 1158.

member of the West Coast Congressional Delegation. In compliance with the letter of February 13 of the West Coast Delegation, the Executive Order of February 19, 1942 was issued.

That dual nationality is no wicked invention of any one government but is the simple result of conflicting municipal laws has been carefully explained by many eminent students of nationality and constitutional law. One of these, an assistant solicitor in the Department of State, has written:

> "Pradier-Fodéré in his learned work on Public International Law discussed with particular care and at considerable length the difficult question of conflicts of nationality laws. * * * My excuse for adding to these dissertations is the fact that, though a third of a century has elapsed since Pradier-Fodéré's book was published, the problem of dual nationality remains unsolved, and very little progress, if any, has been made toward a solution. So long as in the laws of half of the countries of the world nationality continues to be based primarily upon place of birth (*jus soli*), while in the laws of the other half it is based primarily upon descent (*jus sanguinis*), the problem will continue to exist, to the confusion of the individuals concerned and the harassment of the foreign offices of the countries whose protection they seek or whose demands they attempt to evade, unless a solution is reached by international agreement. The problem is not made simpler by the fact that most of the countries whose laws of nationality are based upon *jus soli* have engrafted upon them, to a greater or less extent, the rule of *jus sanguinis*, while many of the countries holding to the latter rule have engrafted upon their laws, in one way or another, rules deduced from *jus soli*."[17]

17. Richard W. Flournoy, "Dual Nationality and Election." *30 Yale Law Journal*, No. 6, April 1921, p. 545.

Borchard, in an important study, has treated the same subject, and has shown how generally conditions of technical dual citizenship have arisen:

> "The same individual, as has been observed, is sometimes claimed as a citizen by two or more states, due to differences in their municipal legislation as to when citizenship begins and ends. The concurrent claims of the *jus soli* and the *jus sanguinis,* the absolute or conditional refusal of some states, *e.g.,* Russia and Turkey, to permit expatriation, followed nevertheless by the naturalization of their emigrating subjects by other states, or any new naturalization before the bond of allegiance to the original state has been severed, create cases of dual nationality which have given rise to serious conflicts. * * * By international agreements and municipal law, states have within the past forty years endeavored to remove these sources of conflict, or at least, by mutual concessions, to agree on the circumstances under which protection shall be accorded and permitted."[18]

In this same work we also find this clarifying passage:

> "By the municipal law of the United States all persons born in this country of alien parents are citizens of the United States. This government also recognizes, as well as adopts, on its own part, the rule that children born abroad of citizens are themselves citizens of the country to which the parents owe allegiance. There arises, therefore, by reason of the concurrent operation of the *jus soli* and the *jus sanguinis,* a conflict of citizenship, spoken of usually as dual allegiance. Inasmuch as each state may determine for itself the methods for acquiring and conserving its nationality, and as such states have adopted some form of the *jus soli* as well as

18. Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad,* 1927, p. 19.

> some form of the *jus sanguinis,* these conflicts of citizenship at birth are frequent, although they are somewhat tempered by the fact that most countries admit that the child endowed with dual nationality must, upon reaching majority, make an election of citizenship."[19]

This author discusses the disagreements between the United States and other countries over persons whose allegiance was claimed by both. He notes that Russia and Turkey have not recognized unpermitted naturalization of its nationals abroad and have punished former subjects, claimed by America, when they have visited the land of their birth.[20] He shows that other states (among them France, Switzerland, Italy, the Netherlands, Bulgaria, Greece and Persia), while they permit expatriation in some circumstances, "predicate the recognition of the American citizenship of one of their subjects upon the completed performance of certain obligations to his native state, usually the fulfillment of his military service, * * *."[21]

Strangely enough, in all this exposition of the conflict of laws and rival claims, Japan is not once mentioned by Borchard as an offender or source of difficulty.

The classical treatment of dual citizenship or double allegiance is by Moore,[22] who devotes over two hundred pages to an analysis of the problem. His general statement is as follows:

> "The doctrine of double allegiance, though often criticised as unphilosophical, is not an invention of jurists, but is the logical result of the concurrent operation of two different laws. In the absence of

19. *Ibid.*, pp. 575-76.
20. *Ibid.*, p. 546.
21. *Ibid.*, p. 546.
22. John Basset Moore, *A Digest of International Law*, Vol. 3, 1906, pp. 518-751.

> a general agreement for the exclusive application, according to circumstances, of the one or the other of such laws, the condition that actually exists is described by the term double allegiance. An undisputed example of it is furnished by the case of a child who, by reason of his parents' being at the time of his birth in a foreign land, is born a citizen of two countries—a citizen of the country of his birth *jure soli*, and a citizen of his parents' country *jure sanguinis.*"[23]

In none of these descriptions, it will be noted, is there any mention of the Mikado or of Japan. The disputes of the United States over dual citizenship seem to be most acute with European powers, and in a number of cases the situation has deteriorated rather than improved, as Moore points out in another volume:

> "Besides, the increasing pressure of the military system in Europe has made the non-treaty powers more and more reluctant to recognize the expatriation of any citizen or subject who has not performed the entire military service which the law prescribes. This tendency is clearly seen in the case of France, who, abandoning a less stringent rule formerly applied, now enforces her military laws upon Frenchmen naturalized abroad who were at the time of their naturalization subject to military service in the active army or in the reserve of that army. By the Italian civil code of 1866, citizenship of that country is lost by naturalization abroad, but it is expressly declared by the same code that this does not carry with it exemption from the obligation of military service or from the penalties inflicted on those who bear arms against their native country.

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23. *Ibid.*, p. 518. For further details concerning the conflict of these two principles see John Basset Moore, "The Doctrine of Expatriation." Harpers, CX, 1905, pp. 234-236; Charles Cheney Hyde, *International Law, Chiefly as Interpreted and Applied by the United States*, 1922, pp. 658, 666-69; Ellery C. Stowell, International Law, 1931, pp. 190-91; Donald Young, *American Minority Peoples*, 1932, pp. 214-15.

> Other countries, including Switzerland, have laws of similar purport; but the Swiss laws contain a provision under which a native of that country may, if he sees fit to do so, renounce his natural allegiance. The most difficult case to deal with is that of Russia, by whose laws any native of that country who enters a foreign service without the permission of his government, or takes the oath of allegiance to a foreign power, is exposed to the loss of all civil rights and perpetual banishment from the empire, or, in case of his unauthorized return to Russia, to deportation to Siberia. In addition to this, he is required to perform his term of military service. Turkey, prior to 1869, recognized the right of expatriation, but has since refused to do so. * * *."[24]

In an effort to restrict the area of conflict over dual citizenship, this country has entered into separate naturalization conventions with 14 European and New World nations.[25] By these agreements each of the countries involved pledges that it will make no claim upon a former national who becomes a citizen of the other state. Yet there have been many states with which it has been impossible to conclude such an understanding.

A struggle over dual citizenship had been in progress between United States and nearly every nation of the globe long before Japan ever rose into political or military prominence. At first there was no possibility of dual citizenship claims involving Japanese, for until 1885 Japan forbade any immigration from her shores at all. When finally Japan permitted immigration to Hawaii, she stipulated that these immigrants should always remain citizens of their place of origin. In this Japan, in her process of

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24. John Basset Moore, *American Diplomacy*, 1905, pp. 190-191.
25. William M. Malloy, *Treaties, Conventions, International Acts, Protocols* and *Agreements Between the United States of America and Other Powers*. Senate Document No. 348. 61st Congress, 2d Session, 1910; Senate Document No. 348, 67 Congress, 4th Session, 1923.

westernization, was following laws "similar to those of France and certain other countries."[26] Whatever friction has developed, therefore, is in no way connected with Japanese plots or Japanese ways, but results entirely from Japan's acceptance of Continental Nationality concepts. As one student of the subject has said:

> "The Japanese government, which has adopted many western practices, has been following the rule of *jus sanguinis*, the system used by most European governments, according to which she has claimed the citizenship of those born of Japanese parentage on foreign soil. (This system was followed by the United States up to 1907. Cf. 34 U. S. Statutes, 1929.) Because Japan has followed the European practice, certain problems have arisen in America where, under the Fourteenth Amendment, all persons born in the United States are citizens thereof."[27]

The first Law of Nationality of Japan was formally promulgated in 1899. It stipulated, in keeping with the *jus sanguinis* rule borrowed from Continental practice, that "A child is a Japanese if his or her father is a Japanese at the time of his or her birth." It is this provision that some have in mind when they repeat, "A Japanese is always a Japanese." They like to forget, however, that the Nationality Law of Japan has twice been revised since 1899. As a matter of fact, expatriation under the 1899 Nationality Law was not impossible, though it was difficult for a male unless he had completed active military service or had been exempted.[28] It is significant to remember that the request for the liberalization of the Japanese Nationality Code *came from Japa-*

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26. Edward K. Strong, *The Second-Generation Japanese Problem*, 1934, p. 140.
27. William C. Smith, *Americans in Process: A Study of Our Citizens of Oriental Ancestry*, 1937, p. 133.
28. *Ibid.*, p. 134; see also Kiyo Sue Inui, *The Unsolved Problem of the Pacific*, 1927.

nese residents of the United States and *Americans of Japanese ancestry* who wished to divest themselves of Japanese citizenship. In 1914 and 1915, the joint conference of the Japanese Associations on the Pacific Coast "passed a resolution, recommending the revision of the nationality law of Japan so as to solve the question of dual citizenship. Acting upon this resolution, the Japanese Associations memorialized the legislature of Japan, urging immediate action on this matter."[29] In 1916, the law was altered to make it easier for American-born dual citizens of Japanese ancestry to expatriate. However, those who had petitioned the Japanese government were not satisfied, for this law permitted males to renounce Japanese citizenship only until they were 17 years of age. After that a man had to wait until he had completed military training or until he was past military age.[30]

Again pressure was brought upon the Japanese government by those of Japanese ancestry in the United States and its territories. Resolutions were once more passed by organizations on the Pacific Coast and on November 28, 1919, the American-born persons of Japanese ancestry forwarded this petition to the Japanese government:

> "We, the members of the American-Japanese Association of the Territory of Hawaii, comprising practically all those born of Japanese parentage within the confines of the United States, who are now living within the Territory of Hawaii, respectfully petition that the attention of the Japanese Parliament be called to the matter herein stated, so that remedial legislation can be had to protect us and to prevent our position as citizens of the United States from being misunderstood.
>
> "We are all men of Japanese parentage, born on the soil of the United States, and who have been

29. Kiyoshi K. Kawakami, *The Real Japanese Question*, 1921, p. 174.
30. Yamamoto Ichihashi, *Japanese in the United States*, p. 323.

educated in the schools of that country. We wish to be considered citizens of the country in which we are now living, and to show that men of Japanese ancestry can be as loyal to the country of their adoption as men of other ancestry residing therein.

"The present Japanese law as to declaration of citizenship works a great hardship for us. The question of dual citizenship and the criticisms which have been made against American-born Japanese have caused us to feel that some legislation should be passed by the country of our ancestors that will free us from any obligation to it, and allow those of us, who have located within the United States with the purpose and intention of remaining and interesting ourselves in the affairs of that country, to show that we can be good and loyal citizens of the country of our adoption. It is impossible to do this, while the country of our forefathers refuses to allow us to be recognized as American citizens through the restriction of its law and claims us as her own."[31]

Even before the answer came from Japan, Japanese nationals in the United States were taking matters into their own hands and were defying Japanese law, for these Japanese parents, being Asiatics and not eligible for naturalization, were responsible to Japanese law which required them to register their children at a Japanese consulate. Nevertheless a considerable portion of them failed to do so. To quote Buell: "Out of a total of 2,345 Japanese births in the State of Washington for the years 1915-1917, only 1770 were registered with the Japanese consulate."[32]

The Japanese and Americans of Japanese ancestry in the United States continued their pleas for a further

31. Kiyoshi Kawakami, *The Real Japanese Question*, 1921, pp. 186-87.
32. R. L. Buell, *American Journal of International Law*. Vol. 17, p. 34.

revision of the Japanese Nationality Law, and in 1924 their desire was realized when Imperial Ordinance No. 262 was issued on November 15 and went into effect December 1 of the same year. By this ordinance and the supplementary provisions attached to it the *jus sanguinis* principle of the former nationality law was waived in respect to children born of Japanese nationals in the United States of America and certain other Western Hemisphere countries in which the rule of *jus soli* dominates. The essential portion of the ordinance reads:

> "The Law of Nationality is hereby amended to read as follows:
>
> "A Japanese who by reason of birth in a foreign country to be designated by Imperial Ordinance shall have acquired the nationality of that foreign country shall lose Japanese nationality from the time of birth, unless he declares intention to retain Japanese nationality in accordance with the provisions of an ordinance to be enacted in relation thereto.
>
> "A Japanese who has retained Japanese nationality as provided for in the preceding paragraph, or who by reason of birth in a foreign country prior to the designation of such country as provided for in the preceding paragraph shall have acquired nationality of that foreign country, may relinquish Japanese nationality at will, provided that he retains the nationality of such foreign country and has a domicile therein.
>
> "A person relinquishing Japanese nationality under the preceding paragraph loses Japanese nationality."[33]

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33. The full texts of all Japanese Nationality Laws, and of Ordinances pertaining thereto are found in Kiyo Sue Inui, *The Unsolved Problem of the Pacific*, 1927, pp. 300-320. For discussions of the 1924 amendment to the Japanese Law of Nationality see this volume and also E. G. Mears, *Resident Orientals on the American Pacific Coast*, pp. 107-11; W. C. Smith, *Americans in Process*, pp. 132-137; Tsunejiro Miyaoka, "The Japanese Law of Nationality and the Rights of Foreigners in Land Under the Laws of Japan," *International Conciliation*, January, 1925, p. 15; Yamamoto Ichihashi, *Japanese in the United States*, pp. 323-24; E. K. Strong, *Japanese in California*, pp. 45-47.

In a succeeding ordinance the details of the amendment were clarified:

"The following countries are hereby designated pursuant to the provisions of the first paragraph of Article XX-2 of the Law of Nationality:

1. United States of America
2. Argentina
3. Brazil
4. Canada
5. Chile
6. Peru

Supplementary Provision

The present Ordinance shall come into force December 1, 1924.

Regarding the Carrying into Effect of the Law of Nationality

"1. The notification of the retention of Japanese nationality may be made orally together with the notification of birth (the oral notification to be dealt with in accordance with the provisions of Article 57 of the Census Law.) In the case of the notification being made in writing, the intention to retain Japanese nationality may, for convenience sake, be mentioned in the notification of birth, along with the time and place of birth and other details.

"2. It is required that the retention of Japanese nationality shall be notified within 14 days after birth. In the case of this notification being made orally, it shall be regarded as having been made at the time when the person whose duty it is to make it shall have arrived at a diplomatic or Consular Office, and, in the case of a written notification, at the time when it shall have arrived at its destination. * * *"

"3. The retention of Japanese nationality should be notified together with the fact of birth. In case the retention of Japanese nationality alone is notified without being accompanied by the notifi-

cation of birth, the notification of the retention of Japanese nationality should be accepted, and at the same time a reminder should be given of the necessity of notifying the fact of birth.

"4. In case the notification of birth is not accompanied by that of the retention of Japanese nationality or in case the retention of Japanese nationality is notified after the lapse of the prescribed period of time mentioned above, the chiid does not acquire Japanese nationality and consequently the notification of birth should not be accepted."

The Japanese law has been cited at length because it is the fact with which the fancy and slander that has grown up on this subject is refuted. American-born persons of Japanese parentage are *not* born Japanese nationals; they are *not* automatically dual citizens. This has not been the case for nearly 20 years. To *obtain* Japanese citizenship for them, their legal representatives are required to take a *positive* step and register them at a Japanese consulate within 14 days of birth. Japanese consular officials are specifically instructed not to accept registration after the 14-day period and not to accept a notification of birth without an indication that the representatives of the child wish to retain Japanese citizenship for him. Former Ambassador to Tokyo, Joseph C. Grew, in Hearings before a Senate Subcommittee on Military Affairs, United States Senate, 78th Congress, First Session, on S. 444, January 28, 1943, page 116, verifies our views when he declared in part: "it would appear that a person of Japanese parentage born in the United States is regarded as a Japanese subject only if he has been declared a Japanese subject by his parents within 14 days of his birth". When questioned by Senator Mon S. Wallgren of Washington as follows: "Then there are a

great many people of Japanese ancestry in this country who are not in any way citizens of Japan?" Ambassador Grew replied: "Many thousands of them." And when Senator Wallgren made the further observation that: "And they are not permitted dual citizenship?" our former Ambassador to Japan stated: "They are not permitted dual citizenship, and I think they are perfectly loyal American citizens". It must be further observed, as pointed out in an opinion to the Director by Solicitor Phillip M. Glick of the War Relocation Authority, March 26, 1943: "the Japanese policy as evidenced in the legislation of 1924 has not been an aggressive adherence to the principles of descent, but, on the contrary, has represented an apparent attempt to conform to conditions in this country by requiring prompt action on the part of parents wishing to preserve the Japanese citizenship of the Nisei".

Moreover, those who were born before December 1, 1924, and who were therefore automatically dual citizens, are enabled to divest themselves of Japanese citizenship. And those born after December 1, 1924, who are registered by their parents, and who therefore become dual citizens, can likewise renounce their Japanese citizenship. In other words, Japan has made it more difficult for the American-born children of its nationals to acquire Japanese citizenship and easy for them to lose it. She has not sought to retain the allegiance of the foreign-born children of her nationals to the degree that every European power has, as anyone familiar with the history of the struggle between our State Department and England, Germany, France, Russia and many other nations over this matter will know. In this way, by the most liberal nationality provisions on record as far as this country is concerned, Japan indicated her realization that Japanese immigrants and their children in America have come to have their

interests and their allegiance here. By the 1924 law Japan acknowledged that she had nothing to expect or to hope for from these people; in effect she wrote them off her books. Every honest and unbiased student of the subject will agree with Strong who sums up these concessions in Japanese law by saying, "In this manner has Japan met the dual citizenship problem."[34]

That the Japanese amendment of 1924 was intended to reduce the area of conflict and to greatly diminish the number of dual citizens is plain. It remains now to discuss whether the Americans of Japanese ancestry have taken advantage of the Japanese law or whether as Representative Ford of California thinks, 99.9 percent are citizens of Japan as well as of the United States. A number of surveys of dual citizenship among Americans of Japanese ancestry have been made, and the results, in general, agree. The most careful analysis has been conducted by Professor Edward K. Strong and his associates during research into the problems of Americans of Japanese ancestry carried out under a grant made by the Carnegie Corporation to Stanford University. In brief, Dr. Strong found in 1930, six years after the passage of the Nationality amendment, that 40 per cent of those 7 years old and older who were living in California had American citizenship only. Since these were persons born before 1924, they could only have reached that status by definite renunciation of their Japanese citizenship. Of those who were from one to six years of age in 1930, Strong found that two-thirds were American citizens only, that is, their parents had not cared to register them at the Japanese consulate within the required two-week period.[35] When it is realized that in 1930 and before, most of these parents

34. E. K. Strong, *Japanese in California*, p. 46.
35. E. K. Strong, *Japanese in California*, 1933, pp. 46-47; E. K. Strong, *The Second-Generation Japanese Problem*, 1934, pp. 21-22; 142-43.

were themselves Japanese nationals, ineligible for naturalization in this country, and that by failure to register their children as Japanese citizens they were erecting a barrier of nationality between themselves and their offspring, the pro-American bias and lack of bitterness of these Japanese residents will be appreciated.

As the years have gone by the number of dual citizens has been even more sharply decreased. One reason is that the first generation immigrants, the aliens, are now past the child-bearing age and the children born lately are the offspring of the American-born. Most of these American-born parents could not register their children if they would, for as the figures above indicate, they themselves are not citizens of Japan. Thus the children of the second generation or American-born are practically never registered for Japanese citizenship. Also, there has been an increasing tendency on the part of those born before 1924 to relinquish Japanese citizenship.[36] The best estimate is that not more than 20 per cent of the Americans of Japanese ancestry are today dual citizens; in other words, the problem has been reduced 80 per cent in two decades, and bids fair to be wiped out entirely within a generation.

Even the cases of dual citizenship which remain would be reduced materially if the individuals concerned could have their way. One difficulty is that for those born before 1924 the Japanese law requires the presentation of a birth certificate before expatriation is permitted. Many

36. Since 1930, the Japanese American Citizens League, for example, has conducted an aggressive and highly successful campaign for all American-born Japanese, members and non-members alike, who were born prior to December 1, 1924, to take the necessary steps to divest themselves of their Japanese citizenship, a citizenship which was conferred upon them through no fault of their own but through accident of birth. And at late as November, 1941, when the House Committee on Immigration and Naturalization were considering a bill proposed by Secretary of War Stimson which would permit persons born in this country but also claimed by another to appear before some competent American body and repudiate or renounce their other citizenship, the League presented its views in support of the proposed legislation through a special representative.

of these people lived in rural environments where little attention had been paid to such formalities until recently. This was especially true in Hawaii. Consequently, during the last several years before the war, Americans of Japanese ancestry have been seeking some means of finding a formula acceptable to both nations which would make expatriation still more simple. For example, in January, 1940, the Hawaiian Japanese Civic Association sent a petition to Secretary of State Cordell Hull signed by many thousands of young Americans, asking for a simpler expatriation process. The Japanese American Citizens League concurred in this request.

In answer to this display of interest in undivided American allegiance and the pledge of loyalty which accompanied it, Lieut. Gen. Charles D. Herron, commanding the U. S. Army, Hawaiian Department, wrote to Dr. Sakamaki of the H.J.C.A.:

> "Please convey to the committee my congratulations on its fine accomplishment and say that I consider the very general signing of this petition highly significant and pleasing to all friends of your blood.
>
> "In the willingness of the younger Japanese to sign this petition and in their loyal and eager compliance with the draft, as in the attitude of the older generation in accepting the new order for their children, there is complete refutation of suspicions as to their loyalty * * *."[37]

Another reason for the small amount of dual citizenship that does still exist has reference to ultra-Americanism and not the reverse. A good many young people who have no interest in Japan, who cannot speak the language and who have no intention of traveling in Japan,

37. *Japanese-American Review*, January 25, 1941, p. 6.

see no reason to recognize or honor Japan's claim upon them by asking for expatriation. In this they are like hundreds of thousands of persons of German, French, Italian or other ancestry who ignore or are even unaware of the claims of a country into whose jurisdiction they do not intend to go.

There is considerable justification in international law for this position that the rule of residence and the wholehearted identification with one or another country is equivalent to choice of allegiance and citizenship where conflicting claims exist. On this subject Flournoy has said:

> "It does not follow that dual nationality should continue to exist when a person, after attainment of majority, has clearly shown by his action that he prefers one of the two countries to the other.
>
> "The subject of dual nationality was considered at the Hague Codification Conference in 1930. The Conference adopted a special protocol under which a person having dual nationality, who habitually resides in one of the states the nationality of which he possesses, and who is in fact most closely connected with that state, shall be exempt from military obligations in the other. This provision was taken from the draft nationality code of the Harvard Research in International Law (Article 11). While limited in scope, it is quite useful. A considerable number of states have adopted it, including the United States."[38]

Stowell, too, has given much weight to residence as a determinant of allegiance and claim:

> "The alternative form of the Basis of Discussion No. 4 proposed for the consideration of the Conference at the Hague emphasizes habitual resi-

38. R. W. Flournoy, "Revision of Nationality Laws of the United States," *American Journal of International Law*, Vol. 34, No. 1, January 1940, pp. 43-44

dence: 'A State may not afford diplomatic protection to one of its nationals against a state whose nationality such person also possesses, if he is habitually resident in the latter state.' This was also the criterion adopted in 1928 by the Fifth Conference on Private International Law at the Hague."[39]

Moore concedes that a technical double claim on a person may exist, but argues that his allegiance at any one time is undivided, saying:

"A conflict, however, is obviated by the rule - which is indeed but the practical formulation of the doctrine itself—that the liability of the child to the performance of the duties of allegiance is determined by the laws of that one of the two countries in which he actually is."[40]

Borchard takes an even more decided stand:

"The criterion most frequently applied has been domicile. In resolving the conflict of nationality, preference has been given to the citizenship of the country in which the claimant had established or maintained his or her domicile. This continuation of domicile may be considered a form of election of nationality.

"In case of conflict between the *jus soli*, where claimant has continued to reside, and the *jus sanguinis*, preference has almost uniformly been given to the former, following in this respect the diplomatic practice.

"Apart from the implied recognition of the right of election involved in the application of the test of domicile, international tribunals have expressly recognized that a person born with dual nationality has the right, upon arrival at majority,

39. Ellery C. Stowell, *International Law*, 1931, p. 187.
40. John Basset Moore, *A Digest of International Law*, Vol. 3, p. 518.

> of electing the nationality to which he desires to adhere."[41]

Americans of Japanese ancestry do not ordinarily reason in these legal terms, but many of them feel that they have indicated their preference and their allegiance by their residence and manner of life, and they resist acknowledging any claim of Japan, even by requesting expatriation. One example, which may stand for any number which could be given, is the testimony of an American of Japanese ancestry before a Congressional Committee:

> "Now then, speaking of the matter of dual citizenship: Unbeknown to most of us, our parents here throughout the Territory registered us through the Japanese consul. I have heard the question, time and time again, 'Why don't you take immediate steps to expatriate?' I, for one, have. When I enlisted in the National Guard 12 years ago I took steps and expatriated. It was necessary that I should. Many of my friends have not done so. They say, 'Why should we? If we take steps to expatriate, it will be admitting that we have in the past owed allegiance to Japan!' * * *".[42]

One other obstacle to the final and complete elimination of dual citizenship of Americans of Japanese ancestry exists. With the hardened cynicism of professional race baiters, certain individuals and groups at the same time cry for a Supreme Court Decision or a Constitutional Amendment to deprive the American-born of their American citizenship and at the same time assail them for not divesting themselves of Japanese citizenship. This tactic, designed to bewilder and discourage its victims, has been

41. E. M. Borchard, *Diplomatic Protection of Citizens Abroad*, pp. 589-90.
42. *Hearings before the Joint Committee on Hawaii. Congress of the United States.* 75th Congress, 2d Session, Oct. 6 to 22, 1937, p. 197.

practiced for many years. Twenty-two years ago a writer of Japanese ancestry exposed this cruel sophistry and plain persecution in an exchange with Valentine S. McClatchy, Secretary of the Joint Committee on Immigration, whose vocation was publishing but whose avocation was anti-Orientalism. Said this writer, Mr. Negoro:

> "The Sacramento editor is, then, reported as having complained of the smallness of the number of American born Japanese children taking out the renunciation papers, and imputes this to the nefarious designs of the Japanese Government to exercise authority over them. The charge misses the point. The reasons for it are twofold, to wit: First, because they are American citizens by the provisions of Art. XIV of the Constitution, their taking out of papers of renunciation would not add anything to their American citizenship; second, because of the precarious status in America produced by the constant agitation of Hon. H. Johnson, Hon. Phelan and their ilk in California and other parts of the United States against the Japanese and American born Japanese, they are always haunted by the fear of finding themselves men without a country; that is, of finding themselves denied the rights of American citizenship after they have given up their Japanese citizenship. If the Californian is so solicitous about the genuine Americanism of the American born Japanese, then I would suggest to him that he use his immense influence on the State Department at Washington and cause it to submit to the Japanese Government a proposal looking toward the solution of the difficulty."[43]

There is, therefore, no problem of dual citizenship among Americans of Japanese ancestry. Instead there is a myth about dual citizenship that was utilized by the

43. M. J. D. Negoro, "A Defense Against an Unmerited Attack," *The Japan Review*, Vol. V., No. 14, Dec. 1921, pp. 254-55.

vulgar and ignorant to force evacuation. The very fact that this was one of the prime motives discredits evacuation when the truth is known. The truth is that no people of foreign origin have exercised themselves as greatly to terminate dual citizenship than have the Japanese in America and their children. The law of no country is more liberal on this score than is that of Japan. And no people, it should be said finally, have moved bravely and loyally toward undivided American citizenship against more mean-spirited and carping opposition.

3. Japanese language schools were neither unique nor subversive.

In an effort to create the impression that those of Japanese ancestry were a particularly dangerous group, the existence of supplementary schools for the teaching of the Japanese language has been much discussed. This argument has great appeal for the semi-literate. The instigators of evacuation policy used the Japanese language school theme repeatedly, as a glance through the pages of the record of the hearings before the Tolan Committee proves.[44] Of course these witnesses offered no evidence; they simply repeated gossip and assumed what is to be proved, that the schools did not hold to their task of teaching the language, but inculcated subversive doctrine instead.

As far as the Japanese language school is concerned, there is no need to speculate upon its functions and the manner in which they were performed. Because of organized anti-Orientalism on the West Coast everything that the Japanese have undertaken has been subject to close scrutiny. Their language schools are no exception, a number of studies made of them will indicate.

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44. For testimony bearing on this point see pp. 11071, 11086, 11091, 11355, 11393, 11539, 11561 and 11772 of the Tolan Committee hearings.

The accusation that the Japanese language schools are instruments of the Japanese nation to perpetuate Japanese nationalism on American soil is disproved by their known history. Colket correctly points out:

> "The first foreign-language school was established in 1896 [in Hawaii] by a Japanese Christian minister brought to the islands by the Hawaiian Mission Board, and the object of the school seems to have been as much to convert the Japanese children to Christianity as to teach the Japanese language."[45]

A standard history of Hawaii makes the same point:

> "The foreign language schools in Hawaii originated in much the same way as foreign-language schools in other parts of the United States, and for much the same reasons. The earliest schools of this kind (other than English schools) were Chinese, German, and Portuguese. The first Japanese-language school was organized in 1896 by a Christian Japanese who was engaged in religious work among his own people. All of the early Japanese schools were begun under Christian auspices; * * *"[46]

The West Coast language schools had no baser inception than those of Hawaii. In the words of one investigator who has made extensive studies of the Orientals of the West Coast:

> "The first Japanese language school in Los Angeles was organized for the express purpose of helping the children of the immigrant Japanese become good citizens. Japanese had observed the disorganization of children in other immigrant groups and advocated the language school as an

45. Hamilton G. Colket, "Suppressing Japanese Schools in Hawaii," *The Nation*, Nov. 22, 1922.

46. Ralph Kuykendall and Herbert E. Gregory, *A History of Hawaii*, 1933, p. 327.

> instrumentality to aid the two generations in understanding each other, thereby reducing culture conflicts and resultant misconduct. * * * The Japanese have been remarkably successful in controlling the conduct of their children, and the language school, without doubt, has been a factor of no small importance."[47]

In another book the same author writes:

> "The Chinese and Japanese language schools have performed, and for a time will continue to perform, a most useful service in bringing the two generations closer together. When all factors are considered, it is remarkable that there has not been more disorganization and demoralization of the youth. Much credit is due to the language schools for their stabilizing influence in this period of transition. As the immigrant group gradually passes from the scene, there will be less and less need for these schools and they will disappear without suppressive legislative enactments."[48]

The necessary function and social significance of the language schools in promoting the essential bond and understanding between non-English speaking immigrant parents and their children has been emphasized by every competent student of the subject.

Economic requirements, too, have played a large part in the establishment of these schools. Svensrud, who made a careful survey of these institutions, reported:

> "From the social and economic standpoint a knowledge of the language is indispensable now, as a tie between the first generation and the second. Employment at the present time, even in most cases for the college graduates of the second generation, rests with the first generation.

47. W. C. Smith, *Americans in the Making*, p. 302.
48. W. C. Smith, *Americans in Process*, p. 184.

> This situation will undoubtedly change within another generation as evidenced by the alacrity of Japanese boys and girls in learning the American language and customs. But the language schools at present are filling a need, and should be looked on with favor. They are serving the same purpose as once did the German and Scandinavian language schools, which have died out during the last few generations. * * *
>
> "The older generation still controls Japanese business interests, and in order to procure employment from them, it is necessary to know their language."[49]

Strong likewise emphasizes the economic motives:

> "What are the prospects that second-generation Japanese may be employed by Japanese business concerns? One prominent Japanese informs us that Japanese American commercial firms will employ these second-generation children, both here and abroad, provided they know Japanese, as well as English, sufficiently to carry on their work. However, there are not enough of these firms to take care of many second-generation children. It is very necessary, for the reason given above, that second-generation children learn Japanese quite well, but it is very difficult to get them to do so, for several reasons."[50]

The continued economic usefulness of the language schools was related, of course, to the organized campaign of prejudice which made it difficult for a young person of Japanese ancestry to obtain employment in other than Japanese surroundings. With the circular reasoning of malice, the race-baiters succeeded in fortifying an institu-

49. Marian Svensrud, "Attitudes of the Japanese Toward Their Language Schools," *Sociology and Social Research*, Vol. 17, Jan.-Feb. 1933, pp. 259-64.
50. E. K. Strong, *The Second-Generation Japanese Problem*, p. 6.

tion which they hypocritically pretended to deplore. Palmer has made this clear:

> "It is interesting to note, however, that, while ordinarily these schools would tend to be unpopular with children and gradually to disappear, their continued life and vitality are largely due to that uncertainty of status produced by racial discrimination and the denial of economic opportunity to the young American born Japanese. These young people discover that they are most likely to find employment in situations where their knowledge of Japanese is an asset."[51]

Mears, too, has commented on this point:

> "The acquisition of a foreign language in a foreign language school usually connotes to the American a disloyalty to the adopted land. It is a striking commentary on the local situation that the anti-alien legislation since the World War is causing American-born to consider far more seriously the wisdom of learning the tongue of their parents. For as children they speak English; they see no need of another language during the secondary school or high school, but thereafter they suffer an occupational handicap in having the more American point of view and the more Asiatic physical features."[52]

In addition to the social and economic functions already described, certain other reasons have been found for the maintenance of these schools. In some places, when both parents have been employed, they have served as day nurseries. Elsewhere, through the employment of an American teacher, they have striven to give pre-school training in English so that children will not enter the public schools with a serious language handicap.[53]

51. Albert W. Palmer, *Orientals in American Life*, p. 54.
52. E. G. Mears, *Resident Orientals on the Pacific Coast*, p. 358.
53. Reginald Bell, *Public School Education of Second-Generation Japanese*, p. 21.

But the important question is whether, in spite of other functions, the language schools acted as a focal point for Japanese propaganda? All trained investigators who have given attention to this allegation uniformly deny it. Time and material elements alone would prevent this. The legend is that all children of Japanese ancestry attend these schools for sufficient time periods to become inculcated with the ideals of Imperial Japan. Actually Strong found in 1930 that "about 69 per cent of both sexes of the United States-born Japanese have attended Japanese-language schools for an average of 3.0 years for the entire group."[54] Moreover, this authority does not give much reason to believe that a great deal of time could be salvaged for dubious practices from the hour of daily study:

> "In the first place, Japanese is a very hard language to learn, especially to write. In the second place, Japanese-language school work is given after the American day-school work is done, in the late afternoon or on Saturday. Third, young Japanese do not see the need of learning Japanese until they are eighteen or nineteen years old, and by then it is rather late. Fourth, there are not enough of such schools; in some areas none are to be found, and, since they are pay schools, not all Japanese can afford to attend them."[55]

Strong also mentions that white students were not banned from these schools (he personally knew of three boys who had attended), which would hardly be the case if they were designed for subversive purposes.[56]

Palmer calls attention to the supplementary and innocuous character of the schools, saying: "Similar schools have been conducted by the Chinese; and also by the

54. E. K. Strong, *The Second-Generation Japanese Problem*, p. 201.
55. *Ibid.*, p. 6.
56. *Ibid.*, p. 206.

Germans and many other nationalities in the form of parochial schools. The Japanese schools were merely supplementary to the public schools and not a substitute for them as are parochial schools."[57] Millis, who conducted a thorough study, states categorically: "these schools are not intended to perpetuate the traditions and moral concepts of Japan. They are supplementary schools, and at the worst there is much less in them to be adversely criticized than in the parochial schools attended by so many children of South and East European immigrants."[58]

Svensrud, in the paper already cited, likewise disputes the familiar charge:

> "The strongest objection which has been raised in this country towards the language schools of the Japanese has been that they foster anti-American ideas. This accusation is without basis. A thorough study has been made of all textbooks to eradicate such possibilities. The Japanese Association of the Pacific Coast has been cooperative in its desire to eliminate or revise any material which would be considered incompatible with American traditions and customs."

Perhaps the most detailed analysis of this point has been made by Bell and his findings are unmistakable and clear:

> "The Japanese American organizations that have been interested in developing the schools have not been unaware of the social and educational responsibility that is theirs. As early as 1913, the Japanese Educational Association of America, closely affiliated with the Japanese Association of America, gave its attention to the part it was to

57. Albert W. Palmer, *Orientals in American Life*, p. 51.
58. H. A. Mills, *The Japanese Problem in the United States*, p. 265.

play, not in Japanizing the American-born Japanese child, but in fitting him for the American scheme of things. In that year, it adopted the following resolution:

'The goal to be attained in our education is to bring up children who will live and die in America, and as such, the whole educational system must be founded upon the spirit of the public instruction of America.' "[59]

Bell traces the honest and patriotic attempts to compile satisfactory textbooks:

"As early as 1912, when the first meeting of the Japanese Educational Association of America was called in San Francisco, this was one of the problems discussed. Subsequently, in the 1915 meeting, a committee on editing adequate textbooks was selected, since only books published in Japan could be obtained. Because these were Japan-centered, they were inadequate, for the children in the United States think in terms of American life, not in terms of Japanese customs and illustrations. • • •

"Meeting in Seattle in July 1918, the general conference of the Pacific Coast section of the Japanese Association of America resolved (1) to establish an educational research bureau and (2) to publish textbooks for the Coast schools. With the hope of allaying anti-Japanese sentiment the conference passed the following resolution:

" 'a) That the goal to be attained in our education of the Japanese children shall be to make it supplementary to the American public instruction, and the curriculum shall consist wholly of the Japanese language.

" 'b) That every child who comes to a Japanese school and who is not attending the public school shall be directed to attend the public school.

59. Reginald Bell, *Public School Education of Second-Generation Japanese*, p. 20.

> "'c) That the interpretation of anything in the adopted textbooks which may be contrary to the spirit of Americanism should be carefully corrected.
>
> "'d) That we should endeavor to publish proper textbooks which correspond to the spirit of Americanism. This proposition shall be presented to the general conference of the Japanese Association of America.
>
> "'e) That there shall be selected a committee on Americanization.'"[60]

In his conclusion Professor Bell says:

> "In the course of the discussion it is pointed out that the language school curriculum in reading, writing, and speaking Japanese has had genuine social utility in helping to retain group solidarity and moral control, so that the Japanese Americans have had an exceptionally fine conduct-record among the second-generation immigrant groups."[61]

The evidence which has been cited is from trained and dispassionate investigators and not from professional patrioteers and hate-mongers. It was gathered before the outbreak of the great conflict and therefore before passion had warped judgments. The difference between what it tells about the Japanese language schools and what it is fashionable to relate in some quarters is the measure of the degree to which hysteria can gain ground and a sense of proportion can be lost unless the courts, by vigorously protecting constitutional guarantees, recalls this nation to nobler tasks than the persecution of minority groups.

Finally, in regard to the language schools, it must be noted that they were not very effective in teaching their

60. *Ibid.*, pp. 23-24.

61. *Ibid.*, p. 106; For additional information on the Japanese language schools see Yamato Ichihashi, *The Japanese in the United States;* R. D. McKenzie, *Oriental Exclusion;* E. B. Reuter (ed.), *Race and Culture Contacts;* Marjorie R. Stearns, *The History of the Japanese People in Oregon.*

students the rudiments, let alone the mastery, of the Japanese tongue. Witness after witness before the Tolan Committee testified to the effect that most American-born Japanese, even though they had attended the language schools in their youth, could not even read or write the simplest sentences and very few of them could carry on an ordinary conversation entirely in Japanese. The difficulties experienced by the army and the navy in attempting to recruit members for their military intelligence services, and the Office of War Information in finding capable monitors and translators for their over-seas division, verify our contention that the importance of language schools has been greatly exaggerated.

4. Alleged Shintoism is no valid ground for the discriminatory orders.

A reprehensible attempt has been made to create the impression that all persons of Japanese ancestry in this country are Shintoists or Buddhists and therefore inimical to a Christian civilization. Shintoism is represented by these amateur theologians as an extension of Japanese nationalism.

All this is nothing more than a revival of Know-Nothingism, with a new slogan and a new victim. This time it is the Japanese instead of the Catholic who cannot be a good American citizen because of his religion, and it is the Mikado instead of the Pope at Rome who lures the erring from the path of loyalty.

Because of the emotionalism stirred by war, few recognize the danger of this attempt to make religious affiliation a test of loyalty. Shintoism in Japan is a mixture of aboriginal nature worship and more recent ancestor worship. It has become highly formalized and is recognized in Japan as the state religion. Since in the Japanese

mythology the nation is supposed to have sprung from the Kingly line, the remote ancestors or the concept of ancestor is honored in the person of the Emperor. Obviously, this is a cult particularly adapted to a Japanese locale. Though it was brought to this country it could hold only an insignificant number of followers here. And, in its transmission to America, as is so often the case in religious transfers, it was markedly altered. The interest in and reverence for the Emperor disappeared, though the interest in the past and in the great men of the past was maintained. The pictures of George Washington and Abraham Lincoln were hung in the Shinto temple in Los Angeles and the sermons emphasized their contributions and the heritage from men like them who had achieved greatly in the past. And, as for the principles of Buddhism, a naval intelligence officer, writing in the *Harpers Magazine*, October, 1942, declared: "* * * the tenets of the faith are perfectly acceptable and cannot be classified as un-American".

Most of the American-born persons of Japanese ancestry are Christians, and since the American-born now comprise more than two-thirds of the entire group, it can be said that the whole community is prevailingly Christian. Even in 1930 this was already the case, according to the statistics compiled by Strong:

> "The first generation prefer Buddhism to Christianity (77 per cent and 18 per cent respectively). The reverse is the case with the United States born, among whom 39 per cent prefer Buddhism, while 47 per cent of the males and 56 per cent of the females prefer Christianity.
>
> "There is no evidence that the first generation tend to transfer their allegiance to Christianity as they continue to live in California. Their children

clearly do so, as do the young Japan-born who are growing up in the State."[62]

It is strange that this passion "to protect Christian civilization" from Shintoists and persons of Japanese ancestry is never expressed by the legitimate spokesmen for Christianity in this country. From the beginning of the evacuation drive, religious bodies have been critical of the policy. This was so clearly evident in the testimony before the Tolan Committee that the final report of that group included these sentences:

> "Every spokesman for religious organizations who testified on the west coast advocated individual treatment of the Japanese. A panel of church leaders presented this viewpoint in San Francisco."[63]

The Christian press and periodicals have remained unconvinced of the necessity of the move also. When the final Tolan report was released, the *Christian Century* commented sternly in an editorial:

> "If there is any passion for justice and fair play in this country, the publication of the Tolan report on the treatment of American citizens of Japanese descent should produce a national demand for an immediate reconsideration of the policy so far pursued."[64]

Most of the major religious bodies have registered their protest against discriminatory evacuation in one way or another. The National Study Conference of the Federal Council of Churches of Christ in America, meeting at Delaware, Ohio, March 3-5, 1942, issued a report which contains these words: "We would now commit ourselves

62. E. K. Strong, *The Second-Generation Japanese Problem*, p. 224.
63. House Report No. 2124, 77th Congress, 2d Session, May, 1942, p. 148.
64. *Christian Century*, June 10, 1942.

to the task of protecting the rights of American-born citizens of Oriental parentage, who are likely to suffer evil consequences unnecessarily because of racial prejudice and discrimination in our attitude towards Asiatics."[65] On April 20, the Friends met at Richmond, Indiana, and issued a message declaring:

> "The conference is deeply concerned over the dangerous violations of American freedoms involved in the forced migrations from the west coast of the United States and Canada, and would lay upon our members the concern to do all in their power to atone for the wrong done and to assist the victims in every way possible in their readjustment to normal life. We would also urge our members to endeavor to overcome the prejudice, fear and hatred which underlie this tragic situation."[66]

In late June, 1942, during the annual conference of the California Methodist Church at Stockton, California, a resolution was passed which strongly condemned evacuation.

The Congregational Christian Churches have indicated their stand by issuing a pamphlet entitled: *A Touchstone of Democracy: The Japanese in America*. This is a series of articles assailing evacuation and its unsatisfying rationalizations. On July 28, 1942, the Synod of California of the Presbyterian Church took its turn, and through its Committee on Social Education and Action issued a resolution which contained, among others, these points:

> 1. The evacuation policy has involved racial discrimination, in that it was aimed at the Japanese alone, the majority of whom are American citizens.
>
> 2. The policy actually resulted in the practical suspension of the constitutional rights of a mi-

65. *Christian Century*, March 25, 1942, p. 397.
66. *Christian Century*, May 6, 1942, p. 612.

nority of American citizens without due process of law or providing hearings whereby they might prove their loyalty.

7. The evacuation policy has already become a valuable propaganda weapon in the hands of the enemies of democracy, especially in the Far East.

8. A precedent has been set for anti-democratic forces at home whereby they may be able to liquidate other "undesirable minorities."

In the resolution, confidence is expressed in the loyalty of those of Japanese ancestry, and it is urged that hearing boards be employed where "American citizens, at least, can have an opportunity to prove their loyalty."

It is good to know that organized Christianity in this country has not yielded one inch to bigots who would make this a religious war as well as a race war.

5. Possibility of civil disorder exaggerated; vigilantism is no Constitutionally adequate ground for suppression of civil rights, or for racial discrimination; "protective custody" unwarranted.

One of the shabbiest and most unsubstantial arguments advanced in favor of evacuation is the one that sanctimoniously explains that it was undertaken to "protect" the Japanese themselves. This argument and this procedure has some uncomfortable parallels. On a certain black day in 1938 the Jews of Germany, after an officially inspired newspaper and radio campaign of hate against them had culminated in a pogrom, were accorded "protective custody" by the Nazi regime. When the victims of this solicitude managed to writhe out of the grasp of their "guardians," they, too, were dispossessed and homeless. The similarity has not been overlooked and

will increasingly be recognized with the passage of time. Of it Chamberlin has written:

> "The principal reasons advanced for this action are that acts of sabotage and espionage might be committed and that the Japanese themselves would be in grave danger of mob violence and lynch law if new developments in the war should raise racial tension to the bursting point. Giving full weight to these considerations, and recognizing that the Army authorities carried out the evacuation as humanely and efficiently as possible, this 'liquidation' en masse of a racial minority of our citizens sets some uncomfortable precedents. • • •
>
> "The measure was definitely what one would expect in a totalitarian, not in a democratic state, because it has made no attempt at selective discrimination. It is not a reprisal for proved disloyalty; it could be regarded either as preventive punishment or as 'protective custody.'
>
> "There is almost nothing that could not be done under the principle of preventive punishment. And no group that might in the future be unpopular in some locality for reasons of race, color, or religion could feel safe if the consequence of a threat of mob violence should be not the maintenance of law and order, but the uprooting and deportation of the threatened group."[67]

Were these of Japanese ancestry in this country in any danger of mob violence? The answer is "no". There was not even any general hostile feeling against them for a considerable time after Pearl Harbor, and what feeling was finally aroused was artificially stimulated. The Tolan Committee Report of March 19, 1942 makes this clear when it states:

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67. William Henry Chamberlin, "Why Civil Liberties Now?" *Harpers Magazine*, Oct. 1942, pp. 530-31.

> "* * * the formal declarations of a state of war with the Axis Powers created a class of persons knowns as enemy aliens. For at least a month thereafter, however, the temper of the American people remained relatively calm toward these groups in their midst.
>
> "Meanwhile the Federal Bureau of Investigation was active in rounding up those enemy aliens (Germans, Italian, and Japanese) considered most immediately dangerous. These raids were made with the aid of information supplied by the military and naval intelligence services, and often with the collaboration of local police officials. Editorial comment praised these preventive measures, and there appeared no widespread demand for wholesale evacuation."[68]

What, then, caused a change in sentiment and gave the west coast anti-Oriental forces that opportunity which they had unsuccessfully sought for over 40 years? In a footnote the Committee gives the answer:

> "One of the factors making for public antagonism toward persons of Japanese origin in the continental United States was the widespread reports in magazines and newspapers of instances of sabotage for which Japanese residents of Hawaii were allegedly responsible on December 7."[69]

We know now that these rumors of sabotage were entirely, and without exception, false. Protective custody or evacuation was no more necessary than falsehood was necessary. A nation that can censor information about the movement of a ship or a troop train, but which will not exert itself to refute the vilification of an entire minority group within its jurisdiction must accept some

68. *House Report No. 1911*, 77th Congress, 2d Session, March 19, 1942, pp. 1-2.
69. *Ibid.*, p. 2.

responsibility for the consequences to its own dignity and to the unfortunate people involved.

At the beginning of the war the sentiment was markedly against any discriminatory treatment of American-Japanese. On December 8, in the House of Representatives, Congressman Coffee of Washington declared:

> "It is my fervent hope and prayer that residents of the United States of Japanese extraction will not be made the victim of pogroms directed by self-proclaimed patriots and by hysterical self-anointed heroes. It would be a shame and a travesty on democracy if blatant and excited vigilantes should raid the homes of Japanese-Americans, without first according the prospective victim due process of law. As one who has lived as a neighbor, to Japanese-Americans, I have found these people, on the whole, to be law-abiding, industrious, and unobstrusive. Let us not make a mockery of our Bill of Rights by mistreating these folks. Let us rather regard them with understanding, remembering they are the victims of a Japanese war machine, with the making of the international policies of which they had nothing to do."[70]

In December Richard L. Neuberger reported from the coast:

> "* * * no demonstrations against Japanese residents have occurred. Governor Culbert L. Olson of California asked for tolerance in the state with the largest Japanese population. John Boettiger, the President's son-in-law, wrote in the Seattle *Post-Intelligencer*: 'Many of the Japanese in America are as loyal as any white Americans, and it would serve only evil purposes to cause them to suffer * * *.'"[71]

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70. *Congressional Record*, December 12, Appendix.
71. R. L. Neuberger, "Reveille in the Northwest," *The Nation*, Dec. 20, 1941, p. 638.

In January, Chester H. Rowell was able to write:

> "I am glad to report that, so far, there has been no evidence of any such feeling [anti-Japanese]. For their part, Japanese loyal to the United States are organizing excellently and vigorously. Old-line Americans, under the highest quality of responsible leadership, are doing the same thing. The actually disloyal we leave to the FBI and the military police, to be dealt with as individuals, like any other disloyal individuals. On this basis, if we all keep our heads, there may be little for either of these agencies to do, but they are ready. It is our ambition not to follow, toward our fellow Californians of Japanese race, the bad example set by some Japanese militarists at Tientsin and elsewhere in China, toward legal residents there of European and American race. We who know our California Japanese as individuals know what fine people many of them are * * *."[72]

In those early days of the war, there came from all directions those evidences of democratic faith which we have so recklessly bartered away for cheap, totalitarian emotionalism. In a lead editorial, printed December 16, the *Portland Oregonian* delivered this message:

> "The Oregonian has been repeatedly assured that these young Americans of Nipponese blood are soundly American * * *. We have no reason for doubt. Intolerance is a prime factor of the beast with which we are now at grips. It should be our privilege as it is our duty to demonstrate to these young Americans in truth, as in theory, the democracy of which they were taught in our public schools. Here for our part is an opportunity to demonstrate that democracy really works—the rest is up to them."

72. Chester H. Rowell, "Clash of Two Worlds," *Survey Graphic*, Jan. 1942, p. 13.

As late as March 7, Louis Fischer reported from the west coast:

> "In Seattle, I saw a girls' school going on an excursion, and smiling Japanese children were walking hand-in-hand and arm-in-arm with American children. Teachers and superintendents in liberal Pasadena and Seattle told me that the Japanese students were often brilliant and always loyal. Numerous housewives told me they trust their Japanese servants. The public is not showing hate or spite. But the reactionary press and the politicians are out for blood and wholesale internment. Jingoes are endeavoring, under the cover of war-time flag-waving patriotism, to do what they always wanted to do in peace time: get rid of the Japanese, * * *"[73]

In early June, Charles Iglehart investigated the claim that "protective custody" had been necessary, and returned a negative verdict:

> "* * * the West Coast Congressional delegation petitioned the President to empower the army authorities to handle the entire situation and to deal summarily with 'aliens and subversive persons.' This action has since been defended on the ground that the Japanese themselves were in danger. I talked with a good many people of all sorts and found no evidence of any serious danger. Nor could I discover a single case of subversive activity, although the air was filled with unsubstantiated rumors * * *. I cannot escape the conclusion that even as a war measure evacuation was unnecessary. The slumbering embers of public antagonism to the alien group were, it appears, deliberatedly fanned by interested persons and organizations until a conflagration was threatened, but

73. Louis Fischer, "West Coast Perspective," *The Nation*, March 7, 1942, p. 276.

at any time it could have been quenched if the authorities had shown proper firmness.'[74]

An extension of this "protective custody" argument is that it was necessary to clear the coast area of Japanese and American-Japanese so that in case of invasion they would not be mistaken for the enemy Japanese and attacked. The insincerity of this transparent after-thought is glaring. If those who advance it were honest, they would be quite as concerned about the thousands of Koreans, Chinese and Filipinos of the coast who are just as likely to suffer harm as a result of mistaken identity. Do the sponsors of this novel idea advocate that we clear the east coast of Caucasians if invasion should threaten from Germany? Do they imply that England should have emptied the isle of all civilians when the Nazis were chanting, "We Sail for England"? Do they not know that Japan has invaded China, and though the two are oriental countries, China's difficulty has been, not in finding or in identifying the foe, but in obtaining from her allies the arms with which to repel the onslaught?

The apologists for protective custody go one step more. Having assumed incidents in which many Japanese residents and their children would be done to death by American mobs, they point to the manner in which the Japanese could make use of such incidents for propaganda purposes. In view of the boon which the evacuation has proved to be for the Japanese propaganda mill, this concern for America's good name among the nations of the east seems a bit artificial.

There is another circumstance which impugns the good faith of many who urged evacuation on the grounds that

74 Charles Iglehart, "Citizens Behind Barbed Wire," *The Nation*, June 6, 1942, p. 649.

protective custody was essential for the protection of the "endangered" people. If this were their honest conclusion, their interest in the matter would end there. But this has not been the case. These same individuals and groups who were so intrigued by "protective custody", the American Legion, the Native Sons and Daughters of the Golden West, the California Joint Committee on Immigration and various congressmen and state and city officials, have by no means allowed evacuation to terminate their "friendly" interest in those of Japanese ancestry. In fact, this has been only the beginning of their "struggle", to borrow a phrase from the title of a book which fits their pattern of mind precisely. No measure of further persecution has been too egregious or too petty for them to attempt. They are even now sponsoring laws, decisions, amendments or resolutions that aim to divest the American-born of Japanese descent of citizenship, that would authorize the deportation of all of Japanese ancestry, that would cancel civil service positions, that would prevent a return to California for those who lived there, that would permit the confiscation of farm machinery, that would make farming or fishing hereafter impossible for members of the group, that would abolish the present relocation centers and turn them into the most repressive type of concentration camps, that would prevent Americans of Japanese ancestry from serving in the armed forces, and that would even halt the shipment of milk to the Relocation Centers where these people are detained. It is legitimate to ask whether protective custody has not been the first of a series of backward steps, with the end not yet in sight.

6. Discrimination not justified merely because any attack might come from Japan.

It has been argued also that discriminatory evacuation was necessary because any attack upon the West Coast might come from Japan. Obviously, this argument has merit only if there is evidence that persons of German, Italian, or other ancestry would not aid the enemy and that the only aid which the enemy could expect would come from those of Japanese ancestry. Certainly, this ignores the solidarity of the Axis and runs counter to all our past experience.

In the first place, it is obvious that Germany had a great deal to do with the decision concerning the initiation of war in the Pacific. Japan struck, it will be remembered, when the flow of supplies from the United States to Britain was beginning to become embarrassing and hurtful to the Reich. To assume that Germany and Italy, or their sympathizers are not interested in West Coast war plants, or in the course of the war in the Pacific, is simply wishful thinking; and, what is more, in case of invasion or attempted invasion, it would be precisely these people, who are Caucasians, who could command access to the vicinity of war plants and defense installations much more readily than could easily detected Japanese. The very physical features which mark them apart make them easily distinguishable, and, therefore, less valuable in case of invasion.

It is a matter of fact that the only agents of Japan who have been apprehended and convicted have thus far been persons of other than Japanese ancestry. On June 5, 1942, for instance, Frederick V. Williams and David W. Ryder of San Francisco, were sentenced to prison as Japanese Agents.[75] On September 10, 1942 according to

75. *New York Times*, June 6, 1942

a United Press dispatch, Igor Stepanoff admitted that he had acted as an agent of Japan.

If, for no other reason, the Axis nations of Europe, not Japan, are understandably interested in curtailing the productivity of the West Coast: the war materials that are manufactured there find their way in larger quantities to the European fighting front. It will be remembered that it is the Consolidated Liberator, made in Southern California, which is the bomber used extensively in the Mediterranean area; the Douglas Boston, made in this region, has been a mainstay of London defenses; the Vultee Vengeance is the craft with which the R.A.F. and United States forces carry on dive-bombing forays in the Atlantic theatre of the war. If we have ignored these facts, the German and Italians have not. It is well known that the German and Italian Consulates of San Francisco and Los Angeles were hives of subversive activity until they were closed. Actual sabotage on the part of persons of Italian and German ancestry have been reported, although not one instance of such behavior on the part of anyone of Japanese ancestry has been verified. For instance, on October 10, 1942, Nicholino Buonopane, a 23 year old electrician at the North American Aircraft Corporation, confessed to the sabotaging of bombing planes. The Associated Press dispatch of November 17, 1942, reported the sentencing to fifteen years in prison of M. W. Etzel for damaging airplanes. In June of 1942, Dr. Hans Helmut Gros, an American-born Nazi agent and his wife were convicted of sending military information out of the United States in order to help the Nazi cause. On June 3, 1942, William Arthur Schuler, a radio operator, was given a six year prison term in federal court by a federal judge in Los Angeles for sending wireless messages intended for the enemy. In court testimony

on July 29, 1942, at Hartford, Connecticut, it was revealed that Gerhardt Wilhelm Kunze, leader of the German-American Bund, had in 1941 methodically traveled the Pacific Coast gathering information on gun emplacements and vital military information. This information, it may be noted, was intended to reach Japan as well as Germany.[76] If Germany and Italy are totally uninterested in the West Coast, or its fate in the event of invasion, or attack, this feverish activity of which the instances cited are only a small sample must be satisfactorily explained. As a matter of fact, the treatment of the various groups of enemy ancestry and the actual train of events which relate to national security seem to have very little in common. On the evening of June 27, 1942, the announcement was made to the Nation of the capture of German saboteurs who had landed at two points on the East Coast and who had been able, with the aid of friends, to penetrate to the midwest. Yet the next day, on June 28th, notwithstanding this outstanding evidence of German sabotage activity, German and Italian aliens were permitted to reenter Western defense areas which had been closed to them for months.[76a]

If it was necessary to remove all persons of Japanese ancestry from Western defense areas because an attack there might have presumably come from Japan, it is not clear why those of German and Italian ancestry were left undisturbed on the East Coast, which faces their mother countries. Everything that is true of the West Coast in a military sense is true likewise of the East Coast. There are important harbors and defense installations there. Our ships have been sunk in such numbers off the East Coast that it has been repeatedly asserted that the enemy must be obtaining important information about ship move-

76. *Los Angeles Daily News*, July 30, 1942.
76a. *New York Times*, June 29, 1942.

ments from sympathizers on the mainland. German submarines have flourished in the Caribbean and bombarded oil refineries there. Trained saboteurs have actually been landed at two points on our coast and have been able to find aid and comfort among relatives and friends inland. The Atlantic is much narrower than the broad Pacific, and, accordingly, more accessible to invasion and bombing.

7. The argument that these people have been alienated by past treatment answered.

One other rationalization, and a most ominous one, for approving discriminatory evacuation, exists. It is said that since persons of Japanese ancestry have been discriminated against, legally and socially, in American life, they bear resentment against this country and would be likely to retaliate by betraying our west coast to an invader.

If this reasoning is upheld, the country enters a treadmill of intolerance from which there is no escape. Once concede to racists and bigots that the reward of their persecution and slander is discrimination on a national scale and discrimination approved by the highest courts, and the forces are unleashed that will scar and split this nation from end to end.

The psychological basis of this type of thinking is simple and well-known: it is the mechanism of projection. By it, individuals who are moral cowards transfer their sense of guilt for their own personal misdeeds to their victims. It is unthinkable that our country should attempt to justify itself in so crude and obvious a manner. By such convenient reasoning, every horror ever perpetrated on a people can be made acceptable, for discrimination usually precedes some more drastic step. By it, the Nazi treatment of the Jews is vindicated, for the Jews of Ger-

many had suffered civil and social disabilities and therefore, by this sadistic turn of logic, should have been ripe for treason to the Reich precisely as Herr Hitler declared. Every national, racial, and religious minority which has come to this country has in turn been despised and exploited by some who had come before. If this were the only factor operative, our country would be a seething volcano of group antagonisms. But the normal human being remembers friendship as well as injury, kindness as well as hate. The Japanese in America have had their implacable foes but they have also always had their advocates. They have known injustice and they have known justice--and they will know justice again. Opportunistic local politicians have tried to curry favor with the ignorant by passing repressive measures against them: but the courts, then as now, have declared the great majority of these to be invalid. The immigrant Japanese found conditions hard in this land, but they had come from a place where life was harder still. They were certainly subjected to social discrimination, but they came from a country where a rigid caste system operated to the disadvantage of most of them. For every bigot or politician who attempted to drive them into bitterness, there was a teacher, a churchman, a decent citizen who encouraged and inspired them. Even in this crisis, despite the wicked attempt of some elements of the press and in political life deliberately to confuse these hard-working and innocent folk with the Japanese enemy, they do not lack sympathizers and defenders.

Fortunately the forces of evil, past and present, are not as all-powerful as the superficial would like to think. They have not succeeded in isolating these people or in alienating them from the main stream of American life. Some time before the outbreak of war the young Americans of Japanese ancestry sent to Congress the Japanese

American Creed, already referred to in outlining the interest of the Japanese American Citizens League, as an expression of their faith and hope. There is no complaint, no syllable of peevish hurt in it. The only bitterness that may arise in connection with it is that chastened bitterness of the native white American who reads it and reflects upon what we have done to these people.

When the die for discriminatory evacuation was cast, and every reasonable grounds for bitterness and resentment existed, those of Japanese ancestry in this country showed a calm and serenity that was perfectly astonishing. The National President of the Japanese American Citizens League issued this message to the affected section of our population:

> "We have carried on a good fight, to the best of our ability, to safeguard the welfare of our citizens and to give assurances that the Nisei citizens, in the overwhelming main, are loyal and patriotic Americans. Despite our efforts, however, the tide of public opinion has been too strong, although numerous Caucasian friends have given us splendid support and encouragement. These sympathizers have been truly a pillar of strength for those of us who gradually came to realize what the inevitable outcome was going to be.
>
> "Instead of harboring bitterness in our hearts, we are most grateful for the confidence our Caucasian friends have reposed in us in our hour of trial. We will surely demonstrate that their trust in us is fully warranted, and that our Nisei citizens are capable of taking their full share of responsibility in the crucial fight to defeat the enemies of our country at home and abroad."[77]

On May 9, 1942, in a speech at Cleveland, Ohio, the National Secretary of the Japanese American Citizens

77. *Pacific Citizen*, March 1, 1942, p. 1.

League explained what his group resented and against whom they held bitterness. He said:

> "True, our evacuation has been and is—a bitter pill to swallow. But we are not bitter against the United States—we are bitter against Japan, the nation whose 'stab in the back' forced us, who happen to look like them, to pay the price for their infamy and cowardice."[78]

Even long after evacuation, when the Japanese and Americans of Japanese descent who had lived peacefully and usefully on the coast in happier days were languishing in Relocation Centers, an event occurred which tested their faith and strength to the utmost. On October 19, 1942, 600,000 Italians were freed of the stigma of being classified as enemy aliens. Even before the effective date, the reaction of the less fortunate group of citizens whose good name had not been cleared was registered through the official organ of the Japanese American Citizens League. That reaction should bring eternal shame to those who would pile discrimination upon injustice because of an unrealistic fear of fancied resentment for mistreatment suffered sometime in the past. Said this editorial:

> "We hail the official recognition of what we know too well: That being an alien from an enemy country does not necessarily make one an enemy alien. The lifting of the 'enemy alien' from loyal Italians in this country is official, black-and-white, down-in-writing recognition of this fact."

In the concluding paragraph there are no invidious comparisons, no recriminations, no requests for special

78. *Pacific Citizen*, June 4, 1942, p. 5.

favors. There is simply and patriotically a plea for equal treatment before the law and an associated recognition of the cause for which we are fighting:

> "Government recognition of 'loyal aliens' of Italian, German and Japanese nationality will serve notice that we are fighting not races, but false ideas and the men who foster these ideas. We are not fighting those who by accident of birth are Italians, Germans and Japanese and yet, in heart and mind, are Americans. They too are allies."[79]

8. Behavior of these Americans of Japanese ancestry could have been anticipated; Hawaiian Islands *versus* Pacific Coast, a contrast.

It has been said time and again that discriminatory evacuation was necessary because there was no way of knowing how persons of Japanese ancestry would have behaved in case of an invasion of the Coast. No argument is more false or more discredited. Those who advance it find it convenient to overlook entirely the fact that persons of Japanese ancestry resided in large numbers at the very place where Japan had attacked our soil. When the air was filled with Pearl Harbor rumors of sabotage and disloyalty, these people were quick to say that we must take Hawaii and Pearl Harbor as an indication of precisely what would happen in case of an attack upon the mainland. Now that we do know what really happened in Hawaii, now that we do know that persons of Japanese ancestry there fought in the armed forces, took their civilian posts, gave of their blood, and stood shoulder to shoulder with others in repelling the invaders, we must

79. *Pacific Citizen*, October 15, 1942, p. 4.

insist that the parallel then drawn between Hawaii and the mainland be adhered to.[80]

It has also been said that, although the vast majority of those of Japanese ancestry would undoubtedly have been loyal, a few might have given help to the enemy, and, therefore, evacuation of the whole group was imperative. This is an amazing doctrine to find soberly proposed in a democracy. It is terrible enough to punish individuals for misdeeds which others perform, but to punish them for misdeeds which others may *conceivably* perform is close to unspeakable.

This argument, used as a justification for evacuating a whole group because of the possible disloyalty of a few among them, is born of the idea that absolutely nothing was done prior to evacuation to investigate or curb the activities of the potentially subversive. If it can be demonstrated that the Federal Bureau of Investigation and other agencies performed their function faithfully and intelligently enough to control all dangerous aliens, this rationalization loses its weight and meaning. It is no secret that Federal investigators carried on their work in West Coast areas for five years before the outbreak of war. Long before hostilities opened on October 21, 1941, to be exact, F.B.I. Agents visited the Japanese business district in Los Angeles, questioned the officers of Japanese organizations and confiscated records which they thought might be useful in controlling axis activi-

80. For evidence of the unqualified loyalty and patriotism of the Japanese residents and American Japanese in Hawaii at the time of Pearl Harbor attack, see:

Thomas Clark Blake, Remember Pearl Harbor, 1942.
Thomas Clark Blake, "Some Japanese in Hawaii," *Asia*, 1942.
Thomas Clark Blake, "Japanese in Hawaii," *New Republic*, September 14, 1942.
House Report No. 2124, 77th Congress, 2d Session, May, 1942 (Tolan Report), pp. 48-58.
Loomis, Charles F., "Can Hawaii Take It," *Hawaii Educational Review*, April 1942.
Charles S. Bouclog, "Hawaii Shows Japan—and Asia," *Asia*, 1942.

ties.[81] On November 28th, new immigration regulations went into effect which prevented any alien leaving the United States without a valid passport, an alien registration receipt, and a clearance certificate from his draft board. This ruling was instituted as a defense measure to prevent espionage agents from operating in the guise of fishermen.[82]

On December 10th, when Attorney General Biddle announced that the Federal Government had arrested 2,303 enemy aliens, among them 1,291 Japanese, he said:

> "The arrests were made in accordance with a plan of action made months ago after investigation of the persons concerned. Everyone taken into said custody had been under observation for more than a year and had been listed either as a dangerous alien or one that was considered that it would be unwise not to apprehend. * * *"[83]

Again on December 12, Mr. Biddle stated that arrests were limited to persons whose activities had been under investigation by the Federal Bureau of Investigation for some time.[84]

On January 29, on the recommendation of the War Department, Mr. Biddle ordered all Japanese, German, and Italian alien enemies from vital areas in San Francisco and Los Angeles.[85] The Office of War Reports in its weekly publication "A Week of the War" announced on January 30th: "Attorney General Biddle ordered all German, Japanese, and Italian Nations to leave specified vital areas in San Francisco and Los Angeles by February 24, and announced that 27 additional prohibited areas recommended by the War Department would be published

81. *Los Angeles Times*, November 13, 1941.
82. *Los Angeles Times*, November 28, 1941.
83. *New York Times*, December 11, 1941.
84. *New York Times*, December 13, 1941.
85. *New York Times*, January 30, 1942.

later. Mr. Biddle said 'several thousands' aliens, mostly Japanese, would be affected by this first order.''[86]

The same publication announced on February 6th:

> "Attorney General Biddle announced 86 areas in California have been declared prohibited to alien enemies, and in 12 others curfew restrictions have been imposed. The prohibited areas include the entire coastline of California from the Oregon border south to a point approximately 50 miles north of Los Angeles, and extending inland for distances varying from 30 to 150 miles. Mr. Biddle also announced that, beginning February 15, 1942, 7 areas in Washington and 24 in Oregon, will be prohibited to Japanese, German and Italian aliens. When the prohibitions become effective, any Axis alien found on forbidden territory will be interned for the duration of the war. The Justice Department also said enemy aliens affected by the evacuation orders must observe all the regulations that are in effect concerning travel and change of residence."

In announcing this new move, Lawrence E. Davies, wrote from San Francisco to the New York Times:

> "The chief aim of the Department of Justice and the War Department appeared to be the protection of vital industrial and waterfront areas from potential Fifth Columnists.''[87]

On February 13th, the Office of Government Reports revealed that Mr. Biddle had even designated 18 prohibited areas in the State of Arizona, from which all aliens of German, Italian and Japanese nationality were to be excluded after February 24, 1942.[88] Early in February the F.B.I. had arrested 1361 Germans, 2007 Japanese and

86. "A Week of War," January 30, 1942, p. 8.
87. *New York Times*, February 1, 1942.
88. "A Week of War," February 13, 1942.

261 Italians and was holding them for appearance before enemy alien hearing boards.[89]

Charles Iglehart has indicated that the Department of Justice was extremely thorough in its investigation and detention of suspected Japanese aliens, perhaps too thorough:

> "In the first two days after Pearl Harbor the Department of Justice threw its net around 2,000 Japanese aliens; later it raided approximately 2,000 more; and all these are now in detention. I talked with some of them at their camps and found them living in very decent conditions and uncomplaining. I understand that only one or two in a hundred were suspected of actual complicity in any subversive activities; most of them had merely subscribed to some fund or belonged to some organization that was open to question."[90]

On July 18, 1942, Edgar Hoover of the Federal Bureau of Investigation summed up the prewar work of his organization and discussed the internal security of the country in these words:

> "The attack on Pearl Harbor found the F.B.I. completely mobilized on a wartime basis and ready for any emergency. In the first 24 hours after the attack more than 1,000 of the most dangerous enemy aliens were rounded up."

Those who argue that extremely dangerous elements might have been among the evacuees, and who exaggerate the danger that a few persons with subversive inclinations might have achieved, ignore entirely these vigorous counter measures and the long continued work of the F.B.I. They would like to give the impression that nothing had

89. *New York Times*, February 5, 1942.
90. Charles Iglehart, "Citizens Behind Barbed Wire," *The Nation*, June 6, 1942, p. 649.

been done to secure the West Coast or to cope with disaffected individuals.

Now we know from these and many more pieces of evidence that might be cited that vital defense areas were being adequately protected; that the coast and sea lanes were being guarded from enemy agents; that suspicious individuals had been hurried to internment at the onset of the war and that the coast was secure from everything except intolerance.

To return again to the example of Hawaii, it is a strange thing that all the arguments for West Coast evacuation apply much more to a place where evacuation never took place. It is said that the West Coast evacuation was necessary because of danger from attack. Yet it was at Hawaii that the first and most important attack of the war took place and Hawaii is 1500 miles closer to the main theatre of war in the Pacific. It is said that evacuation was necessary because of the numbers of persons of Japanese ancestry on the West Coast, yet in Hawaii they represent 37 per cent of the population and on the West Coast approximately 1 per cent. Hawaii too had its Japanese language schools (and Chinese and Korean language schools as well). It had Shinto Shrines, dual citizens and residents who had taken trips to Japan. Hawaii and the treatment of those of Japanese ancestry in Hawaii are the enduring refutation that all these "reasons" for the West Coast evacuation will not endure the tests of logic and time.

9. Military orders due to race prejudice.

(a) Organized anti-Japanese agitation had set the stage for evacuation.

In his treatment of the beginnings of anti-Japanese agitation on the Pacific Coast, a historian writes:

> "Our story is one of race prejudice. A certain element on the Pacific Coast did not care to live cheek by jowl with the masses of the Orient—and they did not hesitate to say so."[91]

There is every reason to believe that evacuation is simply an additional chapter in this un-American movement, and not, as claimed, a matter of strict military necessity. The evidence indicates, to be very direct, that a small but highly organized vigorously anti-Japanese element on the West Coast, particularly in California, took advantage of the fears, confusion, rumors and emotions engendered by the war to press their fanatical program, and that the formula of military necessity is a face-saving device by which the nation now seeks to excuse the extent to which it has yielded to the historic Know-Nothingism of the West.

To appreciate this fully, one must be somewhat conversant with the spiritual and political blight which has been endemic in California for over 100 years. Says Mears:

> "Californians have inherited a distinct color prejudice from the early conquerors, who found the territory peopled with dark-skinned Indians and Spaniards. This feeling is not nearly so strong in the Pacific Northwest, where there is less imprint from other than white races."[92]

In her classic study of Chinese immigration, Professor Coolidge has sketched the background of the emergence of acute race antipathies in this region:

> "The disorders in the mines of California in the first years were due to many and complex

91. Thomas A. Bailey, Theodore Roosevelt and the Japanese-American Crisis, p. 1.
92. E. G. Mears, *Resident Orientals On the American Pacific Coast*

causes. The doctrine that California was for Americans alone, and that all foreigners were trespassers, was acted upon under the impetus of greed and jealousy, although not justified by law. Race antipathy was mixed with the political doctrines of Know-Nothingism which shortly afterward rolled in a wave across the country from East to West. In the West, the so-called Americans—native, naturalized and unnaturalized — of whom a considerable proportion were Irish Roman Catholics, combined against the brown, black and yellow foreigners in the mines.

"The anti-foreign feeling in California was unquestionably intensified by the presence of Southerners, who comprised nearly one-third of her population in the first decade. Of these a minority were educated, pure-American stock who brought, in some cases, their slaves with them and a profound conviction that this should be a white man's country. But this class was greatly outnumbered by immigrants from the border states of the Pike county Missourian type, whose ignorance and extreme race antipathies classed all persons, other than European whites, together. South Americans, South Europeans, Kanakas, Malays, or Chinese—all were colored; even the French, partly because they were of a darker skin and partly because they, like the Spanish Americans were too high spirited, were attacked as foreigners. The Germans, Irish and Englishmen alone were excepted, although many of them were not naturalized, and had far less right in the country than the native Indians and Spaniards."[93]

By the 1870's, the Spanish-speaking people of California had been subordinated, the Indians were practically eliminated, and other elements had shrunk in numbers and influence. The full force of this accumulated

93. Mary Roberts Coolidge, *Chinese Immigration*, pp. 28-29.

intolerance spent itself on the hapless Chinese. The invective and violence to which the Chinese were treated have few parallels in history. The antics of some politicians to win favor by anti-Oriental utterances was as fantastic then as is the behavior of their modern counterparts in the crusade against persons of Japanese ancestry today. Said Frank M. Pixley, representing the Municipality of San Francisco before a Congressional Committee in 1876:

> "The Chinese are inferior to any race God ever made * * * I think there are none so low. * * * Their people have got the perfection of crimes of 4,000 years. * * * I believe that the Chinese have no souls to save, and if they have, they are not worth saving."[94]

In 1877, the California Senate released a Memorial which raged against the Chinese in the State. One paragraph is enough to convey its temper:

> "During their entire settlement in California, they have never adapted themselves to our habits, mode of dress, or our educational system, have never learned the sanctity of an oath, never desired to become citizens, or to perform the duties of citizenship, never discovered the difference between right and wrong, never ceased the worship of their idol gods, or advanced a step beyond the traditions of their native hive. Impregnable to all the influences of our Anglo-Saxon life, they remain the same stolid Asiatics that have floated on the rivers and slaved in the fields of China for thirty centuries of time."[95]

To properly evaluate the worth of the current lurid charges against persons of Japanese ancestry, it is helpful

94. *Ibid.*, p. 96.
95. *Ibid.*, p. 87.

to review one or two of the typical statements from "statesmen" of an earlier decade. James D. Phelan, Mayor of San Francisco from 1897-1901 and later United States Senator from California, was the author of this spiteful judgment:

> "The Chinese are without home and families; patronizing neither home, school, library, church nor the theater; lawbreakers addicted to vicious habits; indifferent to sanitary regulations and breeding disease; taking no holidays and respecting no anniversaries; but laboring incessantly and subsisting on practically nothing for food and clothes, a condition to which they have been inured for centuries; they enter the lists against men who have been brought up by our civilization to family life and civic duty."[96]

Even as late as 1906, George C. Perkins, United States Senator from California, dipped into his florid vocabulary to find still more offensive terms in which to describe the Chinese residents of his commonwealth:

> "Bringing with them slavery, concubinage, prostitution, the opium-vice, the disease of leprosy, the offensive and defensive organization of clans and guilds, the lowest standard of living known, and a detestation of the people with whom they live and with whom they will not even leave their bones when dead, they form a community within a community and there live the Chinese life."[97]

It was too much to expect that all this spleen would quietly disappear after the Chinese had been excluded and outraged. The animus was easily transferred to the next comers, the Japanese.

96. *Ibid.*, p. 423.
97. *Ibid.*, p. 423.

Sporadic agitation aimed at the Japanese in America began as early as 1890, but it did not reach organized and formidable proportions until 1905. On May 7 of that year, the Japanese and Korean Exclusion League, later to become the Asiatic Exclusion League, was founded, with the express purpose of extending the Chinese Exclusion Law to the Japanese. The organizer and first president of the body was O. A. Tveitmoe, a Norwegian immigrant who became a powerful labor leader in San Francisco and saw the political possibilities of anti-Japanese agitation. Some time later, it was discovered that this worthy had been convicted of forgery in 1892 and had been sentenced to eighteen months in a Minnesota state prison.

The secretary of the Japanese-Korean Exclusion League was a man named Arthur E. Fowler, who attempted to duplicate Tveitmoe's success in Seattle, where he had been employed as a cook prior to his elevation. While Fowler was more honest than Tveitmoe, he was evidently less stable, for in September, 1907, he was adjudged insane and committed to the asylum at Stellacoom, Washington.[98]

This curious chain of events caused Arthur I. Pope, Professor of Philosophy of the University of California to exclaim, "The fact that the anti-Japanese agitation was inaugurated by a criminal, in co-operation with a lunatic furthered by labor agitators and sustained by a yellow press, ought in itself have been enough to damn it. * * *"[99]

But, unfortunately, it was not damned. Instead, the path was blazed and the tone set by the criminal and the insane for future anti-Japanese manifestations. The arguments that these indescribably ignorant, violent and

98. K. K. Kawakami, American-Japanese Relations, pp. 304-05; 324-25.
99. In K. K. Kawakami, *The Japanese Question, A Symposium*, p. 18.

vulgar mobsters invented and utilized, those absurd and false generalities of unassimilability, treachery, dishonesty, and immorality, are the very ones which embellish the diatribes of today against this minority group. Intolerance needs no new arguments so long as it has convenient victims.

There is no need to recite in detail the history of anti-Japanese agitation on the West Coast.[100] The Japanese and Korean Exclusion League grew into the Asiatic Exclusion League. The Asiatic Exclusion League became the California Joint Committee on Immigration after its goal, the Asiatic exclusion provision, became part of the Immigration Act of 1924. This alone proves that the program of these racists was elastic, opportunistic and insatiable. Their true goal, whatever the pretense and immediate stated objective, was, and is, persecution—persecution without reason or end. This was no less true at the time of evacuation. They reduced patriotism to loathsome lies and sacrificed a defenseless people on the altar of greed and hate. Their stated concern was merely the safety of the coast and the welfare of the country which they wished to protect. For the benefit of churchmen, educators and friends of democracy, they shed an occasional crocodile tear because "the innocent had to suffer with the guilty." But, as soon as evacuation became an accomplished fact, the fangs were bared and the story changed. Evacuation was used as a "proof" of disloyalty or incipient disloyalty. Campaigns to disenfranchise the citizens, to deport the aliens, to deport everyone, were launched. And this war within

100. For a good sketch of the history of Anti-Japanese agitation see House Report No. 2124 (Tolan Committee Report), May 1942, pp. 72-90. Also consult Thomas A. Bailey, *Theodore Roosevelt and the Japanese-American Crisis;* Raymond L. Buell, "Development of Anti-Japanese Agitation in the United States," Political Science Quarterly, 1923, pp. 47-81. H. A. Millis, *The Japanese Problem in the United States*, pp. 220-251.

a war, this invasion of the rights of a minority at home, this vicious, relentless attack on the security of women, children and the aged, continues at the present time.

(b) Selfish interests took advantage of the war situation to advocate evacuation.

The real story of evacuation is the history of a militant and vicious minority, who for selfish gains, took advantage of the ation's ignorance of the real issue, and by confusion and distortion, caused the unwarranted exclusion of a defenseless people. On February 21, Lawrence Davies sent an important special dispatch to the New York Times in which he reported, "E. M. Seifert, Jr., president of the Grower-Shipper Vegetable Association, takes the position that 'for the protection of future generations of Californians and Americans, no Japanese, even though he be born in America, should be permitted to own land.' "[101] Thus did an organization, which had been in competition with growers and marketers of Japanese ancestry, try to solve its economic problems in the Nazi way.

In an article published in May, 1942, a little more light is shed on the feverish activities of this organization. To quote:

> "The Salinas Vegetable Growers-Shippers Association had just published a brochure entitled NO JAPS NEEDED, to counteract a widespread impression that Californians would go hungry if the Japanese truck gardeners were removed. * * * The dislike of the militant Growers-Shippers Association for the valley's Japanese farmers is an old and bitter one. The association is composed of a few score large-scale white growers who lease lands, produce lettuce, carrots and other fresh veg-

101. *New York Times*, Feb. 22, 1942.

etables the year round in the Salinas, Imperial and Salt River valleys for the Eastern markets. * * *

"Shortly after December seventh, the association dispatched its managing secretary, Austin E. Anson, to Washington to urge the Federal authorities to remove all Japanese from the area. Anson pointed out to the War and Navy departments, the Attorney General, to every congressman who would listen to him, how the Salinas valley sloped off into Monterey Bay, a most inviting landing place for an invading army; how the valley's Japanese, if they chose to do so, might blow up bridges, disrupt traffic and sabotage defense.

"We're charged with wanting to get rid of the Japs for selfish reasons," Anson told me. "We might as well be honest. We do. * * * If all the Japs were removed tomorrow, we'd never miss them in two weeks, because the white farmers can take over and produce everything the Jap grows. And we don't want them back when the war ends, either."[102]

In this manner, we get some insight into the origin of the "military necessity" argument. The spectacle of that hardy veteran of the war to control lettuce, Mr. Anson, lecturing the generals on military strategy and the vulnerability of the west coast, is one of the degrading episodes of the world conflict.

That neither Mr. Taylor nor Mr. Anson have exaggerated the influence of the selfish economic motive in evacuation is supported by the testimony before the Tolan Committee of Floyd Oles, manager of the Washington Produce Shippers Association, a cooperative formed by Caucasian and American-Japanese farmers who were engaged in marketing fresh produce for eastern markets. Mr. Oles told the committee:

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102. Frank J. Taylor, "The People Nobody Wants," *Saturday Evening Post*, May 9, 1943, p. 24 *et seq.*

"In this area, farming is done, as you have already discovered, by small individual farmers—independent farmers. In our largest competing area in California, the major portion of the production is in the hands of farming corporations who do business on a grand scale. As one of them explained it to me on the phone the other day, 'You people have been a pin prick in our back for a long time up there, with your small production, and we think now we can get rid of you.'

"Whether that is a large or small issue, or activating motive, I think that it should not be overlooked, because I receive in the mail every day now, from these people in California, considerable volumes of propaganda on this point, eagerly seeking evacuation for commercial reasons."[103]

Similar evidence was given by Mrs. Esther S. Boyd, president of the Yakima McKinley Parent Teachers Association and a prominent resident and business woman of the region, in her appearance before the Tolan Committee. In a prepared statement Mrs. Boyd wrote:

"• • • But there now develops on the part of some white people the desire to get rid of these Japanese who have worked so diligently, educated their children well, and achieved some measure of financial security. The great cry of 'Kick the Japanese out of the Yakima Valley' is not due to fear of sabotage; it is due to economic reasons. As one person naively explained to me, 'The white farmer would have more land and more water if he could get rid of the Japanese, and he could demand a higher price for his farm produce.' Is this a more patriotic attitude than that of the Japanese man who said to me, 'I don't want to make a profit this year, Mrs. Boyd; all I want is

103. Hearings Before the Tolan Committee, Part 30, p. 11432.

to raise a crop and have enough to feed my wife and myself' "!

When Mrs. Boyd was being interrogated by members of the Committee, she responded, in answer to Congressman Bender's desire to know whether white men were using the emergency as a means of cheating those of Japanese ancestry of their property: "I am positive that many of them feel that it is a golden opportunity for that. I had one man say, 'Well, we will kick the Japanese off the reservation (Yakima Indian Reservation, where land is leased to outsiders for agricultural purposes), and we will give the white man a chance.' "[104]

The depths of parvanimity, in which the authors descended to pidgin-English to express their contempt for the unfortunates whom they meant to dispossess, is the statement handed the Tolan Committee by the executive secretary of the Seattle Retail Florists' Association.

Said this body, to which any competition is, presumably, "infiltration":

> "The Japanese infiltration into the floral industry is one of economic penetration with all its many ramifications, and indifference to all laws—Federal, State and city. This is accomplished with the bland expression 'Me, no understand.' • • • Our experience has shown us that the majority of Japanese, American or alien born, are not American citizens in the true sense of the word and we wholeheartedly endorse any program of evacuation."[105]

The pressure for the prostitution of our war aims to meet the unblushing demands of selfish economic interests continues. In the *American Nurseryman* for October 1,

104. Hearings Before the Tolan Committee, Part 30, pp. 11584-11585.
105. Hearings Before the Tolan Committee, Part 30, pp. 11610-11611.

1942, it is revealed that a group within an industry in which persons of Japanese ancestry once had strong representation were not deterred by the national emergency from taking steps looking to the future, for it is reported: "Concluding the meeting, Ray D. Hartman requested, for the resolutions committee, that action be urged on the part of the federal and state agencies to prevent the reestablishment of the Japs in California after the war."

Describing the demands for the evacuation, Clarence E. Rust testified before the Tolan Committee:

> "• • • The clamor seems to come from chambers of commerce, Associated Farmers, and the newspapers notorious as spokesmen for reactionary interests. In view of this fact, effort should be made to determine whether there is any connection between the clamor for the dispossession of the Japanese farms and the desire of these clamoring interests to get possession of the Japanese competition."[106]

A report, submitted by Eric C. Bellquist of the Department of Political Science of the University of California, to the Tolan Committee reveals that:

> "As the committee has had ample evidence already, popular resentment toward the enemy is already finding expression in discrimination and even physical violence against fellow residents of alien extraction; distrust, for example, of the Japanese government being transferred to all persons of Japanese race, citizens and aliens alike.
>
> "Here on the coast we have a radio commentator who views the news at 9 o'clock in the morning. For some time, he has been urging that every Japanese, alien or citizens be transplanted to the

106. Tolan Committee, Part 29, San Francisco Hearings, Exhibit 9, p. 11254.

other side of the Rockies. In appeal after appeal he has incited the people and aroused their suspicion. We have a former far eastern newspaper correspondent who, toward the end, had difficulties in Japan and has since been reviling the Japanese in our country and urging restrictive action of far-reaching scope against both aliens and citizens. We have certain interests in the State—some agricultural, some 'patriotic,' some closely affiliated with certain newspapers—which have long been hostile to orientals in general as well as other aliens, and which have now found a golden opportunity to come out against the Japanese on the Pacific coast. City councils and county boards of supervisors have been passing restrictive ordinances, petitioning the Congress to enact legislation against our Japanese, and in many respects to take over functions properly belonging to the National Government. The mayors of our two largest cities, as well as many smaller ones, have lost their composure along with the rest. The State personnel board at Sacramento has sought to take action contravening the Constitution as well as the expressed sentiment of our highest officials, including the President.

"Altogether, as the committee has witnessed, the State of California, as well as Oregon and Washington, has been giving a demonstration of lack of balance and outright intolerance which will blacken its record for many years to come. If our public authorities have thus succumbed to hysteria, one can well understand, if only deplore, the housewives who dismiss Japanese gardeners and servants and farmers who discharge help because of citizenship or extraction. On the whole, the public has not shown so much hate or spite, except as it has been incited to do so. But pressure groups and shortsighted politicians facing an election year are out for blood and wholesale internment. Jingoes are endeavoring, under the cover of wartime flag-

waiving patriotism, to do what they always wanted to do in peacetime—get rid of the Japanese, harness labor, and frighten the liberals, as Louis Fischer has just pointed out in one of his reports from the coast.

"From the hearings which the committee has conducted, I am sure that its members must have obtained a suspicion that the attitude which now prevails cannot be a matter of mere chance; that it is rather the result to no small extent of organized pressure. Certainly the course of events would appear so to indicate.

"Despite the treacherous nature of Japan's attack on Pearl Harbor, there was no immediate reaction of suspicion of aliens in California. While at the outset our people were naturally somewhat confused and alarmed at the events of early December, there was little hysteria. Californians kept their heads remarkably well. There were few if any serious denials of civil rights to either aliens or citizens of Japanese race on account of the war. As late as December 29, 1941, the Northern California Committee on Fair Play for Citizens and Aliens of Japanese Ancestry could issue a statement expressing general satisfaction with the manner in which the American tradition of fair play had been observed. As its release of that date indicated, all the organs of public influence and information had discouraged mob violence and pleaded for tolerance and justice for all law-abiding residents of whatever race. Federal and local officials charged with maintaining order and suppressing subversive activities had shown both vigor and sympathetic consideration in the fulfillment of their duties, and private civic agencies had acted promptly to handle the many difficulties encountered by Japanese residents on account of necessary wartime restrictions on persons and property.

"In brief, up to the end of the year, there had been no panic and little infringement upon rights

and liberties. The people were calm and went about their business in getting ready to face the war, maintain morale, and put forth the common effort necessary to meet and defeat the forces of brutalitarianism.

"In short, there was no popular clamor for comprehensive restrictions or mass evacuation. Not until inflammatory commentators on the 'enemy-alien menace' undermined popular confidence did the present hysteria arise. I cannot believe that this is just a matter of chance. The committee will do well to endeavor to ascertain just what lies behind present clamor. What are the real motives?

"The appraisal which I have here made has been confirmed by several of the more thoughtful witnesses appearing before the committee. It is shared by most persons who are really familiar with the problem and have no ax to grind, persons farsighted enough to consider the Nation's interest in the future as well as the present."[107]

Galen M. Fisher has summarized this anti-Japanese cabal as follows:

"It would be quite false to charge that all advocates of evacuation were self-seeking or race-biased, but it is true that among them were the professional anti-Orientalists, such as the Hearst press, and certain politicians, merchants, farmers and realtors who itched for a chance to turn the anti-Japanese agitation to their own profit.

"Such were some of the major forces that drove the nation, as by fateful necessity, to adopt the drastic policy of indiscriminate evacuation of citizens and non-citizens alike, of Japanese ancestry."[108]

107. Tolan Committee, Part 29, San Francisco Hearings, Exhibit 7, pp. 11242 and 11243.

108. A Touchstone of Democracy, Council for Social Action of the Congregational Christian Churches, 289 Fourth Avenue, New York.

10. Americans of Japanese ancestry are just as loyal as any other group of American citizens.

Unfounded allegations and inferences have been constantly circulated suggesting that Americans of Japanese ancestry are a *peculiar people*, who, because of their ancestry *per se*, are more dangerous and disloyal than any other group of citizens.

It is interesting in this connection to note that specific charges which prove these allegations have never been made, but rather that false generalizations based upon half-truths and distorted conclusions have been permitted to cloud the real issues as to the intrinsic loyalty and allegiance of this much-maligned minority.

But, before examining these vicious rationalizations to determine their validity, let us look into the logic behind the arguments that persons of Japanese ancestry possess either inherent characteristics or have been indoctrinated in such a manner as to permit a reasonable classification for evacuation based solely upon race. By this theory, there is imputed to each person of Japanese ancestry those qualities which the calamity howlers have imputed to this racial group as automatically possessing. No more vicious doctrine could be invented. Without any proof whatsoever, these people allege that the Japanese have a tendency to be disloyal, are ancestor-worshippers (hence look to Japan for their spiritual allegiance), are Japanese nationalists, and in general are outside the pale of the American cultural pattern. It follows, so it is claimed, that every person with any amount of Japanese blood possesses these qualities.

Although the Court apparently approved the concept of "guilt by association" in *Whitney* v. *California*, 274 U. S. 357 (but with a dissent by Justices Brandeis and Holmes), the Court in later cases has moved away from

this position and has emphasized the importance of the individual guilt or innocence. *Herndon* v. *Lowery,* 301 U. S. 242; *De Jonge* v. *Oregon,* 299 U. S. 353.

In the cases cited, the question involved was whether guilt should attach to the defendant merely because of his association with an organization of allegedly subversive character. The Court did not, in the later cases cited, go into the views of the organization but held that regardless of what they were, the defendant could be found guilty only if he himself advocated proscribed views.

All these cases involved alleged membership in, or association with, a political organization. Such adherence, if any, is obviously a matter of choice. But what choice has a person to determine into what race he shall be born? If, as Chafee, in his "Free Speech in the United States" says, "This idea (of guilt by association) is absolutely abhorrent to every American tradition * * *," when applied to membership in proscribed organizations, *a foritori,* it is even more abhorrent where guilt is attached to membership in a particular race.

It is clear, therefore, that this arbitrary grouping together of all persons of Japanese blood into one category without individual examinations or hearings is not only illogical but also manifestly unfair and un-American. Without these (individual examinations and hearings), one of the most cardinal principles of American and Anglo-Saxon jurisprudence has been violated, namely: that guilt is personal in character and cannot be assumed on the basis of association.[109]

It is, of course, no answer to claim that guilt is not an issue in these cases at bar, nor that punishment has not been inflicted. This Court, for example, has not applied the "guilt by association" doctrine in deportation cases,

109. See Chafee, op. cit. pp. 470-484.

which are not criminal in nature. *U. S. ex rel. Vajtauer v. Cormick,* 273 U. S. 103. Furthermore, it is argued that persons of Japanese blood tended towards "unsocial" behavior, which implies some elements of "guilt", at least.

Whether or not strictly criminal in nature, exclusion certainly is a deprivation of liberty.

Since we cannot justly presume that every individual person of Japanese ancestry possesses the alleged characteristics of the Japanese race, let us examine the claimed characteristics of this particular race, for their validity.

It has been charged that American citizens of Japanese ancestry are disloyal. If Bouvier's Law Dictionary, 1934 edition, page 769, definition of loyalty, "adherence to law," is to be used as a criterion of loyalty, none can dispute that Americans of Japanese ancestry have the best record of any nationality group in this regard. The records of the criminal courts in all communities in which Japanese resided are uniformly conspicuous for their lack of arrests and convictions of Japanese for law violations, including the most petty ones.

As far as we know, there have been no reported cases of arrests of any American of Japanese ancestry for violating the sabotage sections, espionage acts, sedition laws, and state criminal syndicalism regulations before, on, and since the attack on Pearl Harbor. The Tolan Committee Reports contain pages upon pages of testimony to the effect that no sabotage occurred in Hawaii on December 7, 1941, contrary to the circulated rumors of fifth column activities there which furnished the race-baiters and professional Oriental-haters with their excuse for demanding the exclusion of persons of Japanese ancestry from the Pacific Coast.[109a]

109a. Tolan Committee, Preliminary Report, House Report #1911, p. 2; 4th Report, p. 48 *et seq.*

Not only is the record for law-obedience unusual insofar as this group is concerned but also in their showing in civic participation. Americans of Japanese ancestry and their resident national parents have consistently contributed more to such appeals for financial aid as the Red Cross, Community Chest, Infantile Paralysis, and Defense and War Bond drives. It is a matter of common knowledge on the Pacific Coast that the campaigns of American Japanese are the only ones which consistently over-subscribe their quotas. Indeed, even though Americans of Japanese ancestry now residing in the War Relocation Centers are receiving only twelve, sixteen, and nineteen dollars per month for their labors, most of them are subscribing at least ten per cent of their total wages for War Bonds and Stamps. Too, the American soldiers of Japanese ancestry stationed at Camp Shelby, Mississippi, training for special combat service, purchased $100,600 worth of War Bonds in two days, after learning of the executions in Tokyo of American airmen, according to the *Pacific Citizen,* April 29, 1943. When the "Buy a Bomber" campaign was conducted in San Francisco last February, the San Francisco chapter of the Japanese American Citizens League received nation-wide publicity for their leadership in raising funds to buy a bomber to bomb Tokyo. All of these should indicate that Americans of Japanese ancestry are interested in their country's welfare and future.

Another well-known trait of American Japanese is their ability to remain off the relief rolls because of their thrift, pride, and ambition. The National Secretary of the Japanese American Citizens League called these matters to the attention of the Tolan Committee at the San Francisco hearings.

An interesting sidelight on this matter of loyalty is the fact that practically every person of Japanese ancestry who fought in the armed forces of the United States

during the first World War became members of the American Legion.

Another noteworthy fact is that immediately following the outbreak of war, the Governor of California and most of the political leaders on the West Coast spoke of the loyalty of Americans of Japanese ancestry in no uncertain terms and called for tolerance and fair play for these people. The *Pacific Citizen*, official organ of the Japanese American Citizens League, featured these stories and testimonials in their New Year's edition for 1942. The National Secretary and Field Executive, in a special prepared statement, called attention to these unequivocal evaluations of the loyalty of American Japanese. It was not until the organized campaign for evacuation began that these same political leaders changed their tune and began to insinuate that Japanese Americans could not be trusted.

Still another example which may shed some light on the question of allegiance is the fact that many Japanese Americans, long before December 7, 1941, took the necessary legal steps to renounce their Japanese citizenship, over which they had no control because of the laws of Japan, and thereby renounced forever all their property rights in Japan. A naval intelligence officer, writing in the October, 1942, issue of *Harpers Magazine*, verifies this statement by stating: "A great many of the Nisei had taken legal steps through the Japanese Consulate and the Government of Japan to divest themselves officially of Japanese citizenship (dual citizenship) even though by so doing they became legally dead in the eyes of the Japanese law and were no longer eligible to inherit any property which they or their families might have held in Japan." It would seem that this common practice would certainly indicate the true allegiance of many American Japanese.

To the charge that American citizens of Japanese ancestry were clannish and unassimilable, the Japanese American Citizens League points to the records which show that, as the years went by and young Japanese Americans grew into maturity, more and more of their people were actively participating in the American scene. They point out that, in proportion to their numbers, more Japanese Americans have been valedictorians and honor students in their respective schools and colleges than any other group. They point out that several of their athletes, like Bill Kajikawa, have won all-American honors in their respective fields. They point out that, again in proportion to their numbers, more Japanese Americans have held elective offices in their schools and colleges than almost any other minority group. As a matter of fact, this spring, Kenji Okuda, an evacuee transfer student from the University of Washington, was elected student body president at Oberlin College, in Ohio. This is just one instance to illustrate how far Americans of Japanese ancestry have been accepted by their fellow Americans.

The same intelligence officer quoted previously in *Harpers Magazine,* after a thorough examination of the subject for the Navy, wrote as follows:

> "The Americanization of the *Nisei* is far advanced. The attitude of the *Issei* parents has had a great influence on the *Nisei* children. The last *Issei* to enter the United States did so in 1924—eighteen years ago. American influences have affected these *Issei,* consciously or unconsciously, directly or indirectly, since that time. It must be remembered that one of the chief factors affecting the Americanization of the parents has been the children themselves—in the reports they bring back from their school life, their play, and their association with white American children.
>
> "These factors have worked to a greater or lesser degree on the individual *Issei* parents. The

real conflict between the two ideologies, American and Japanese, is in the *Issei,* for they have their background of life in Japan and must struggle to reconcile these two very different phases of their lives.

"It must therefore be conceded that the Americanization of the *Nisei* children has proceeded with at least the tacit consent, if not the active co-operation, of many of the Japanese-born parents."

The Americanization of Americans of Japanese ancestry has gone much further than most people believe possible, and this, in spite of the many barriers placed in their way.

According to the authorities, the "ancestry" of those Americans born of Japanese parents is no barrier to their appreciation of and participation in American life. Moreover, it is absurd to claim that any *race* is innately incapable of assimilation into American life, for modern American culture is a pattern of elements which have originated with many peoples and in all quarters of the globe. Professor Ralph Linton of Columbia University has, in his *Study of Man,* wittily deflated this indefensible and undemocratic notion, the child of ignorance and provincialism:

"Our solid American citizen awakens in a bed built on a pattern which originated in the Near East but which was modified in Northern Europe before it was transmitted to America. He throws back covers made from cotton, domesticated in India, or linen, domesticated in the Near East, or wool from sheep, also domesticated in the Near East, or silk, the use of which was discovered in China. * * * He takes off his pajamas, a garment invented in India, and washes with soap invented by the ancient Gauls. He then shaves, a masochistic rite which seems to have been derived from either Sumer or ancient Egypt. * * *

> "When our friend has finished eating he settles back to smoke, an American Indian habit, consuming a plant domesticated in Brazil. * * * While smoking he reads the news of the day, imprinted in characters invented by the ancient Semites upon a material invented in China by a process invented in Germany. As he absorbs the accounts of foreign troubles he will, if he is a good conservative citizen, thank a Hebrew deity in an Indo-European language that he is 100 per cent American."

Unscientific too, is this blanket condemnation of a whole group of people. If individual differences are not to be recognized in this country, if the individual personality is not to be respected, if Nazi notions of mass or race guilt are fit evidence to place before an American court, what quarrel can there be with the totalitarians?

In his book, *Prometheus,* Professor H. S. Jennings has enunciated the scientific basis for individuality, and, incidentally, for democracy:

> "Every pair of human parents contains thousands of pairs of the packets of chemicals on which development depends. From these a set is drawn almost at random * * *; this constitutes the heritage of the child. Any pair of parents may thus produce, not merely thousands, but millions, of different combinations, each yielding a child of different characteristics."

And Professor Franz Boas, the leading anthropologist of our time, has eloquently struck out in his *The Mind of Primitive Man,* at the shabby habit of thought which underlies appellant's argument:

> "Our tendency to evaluate an individual according to the picture that we form of the class to which we assign him, although he may not feel any inner connection with that class, is a survival of

> primitive forms of thought. The characteristics of the members of the class are highly variable and the type that we construct from the most frequent characteristics supposed to belong to the class is never more than an abstraction hardly ever realized in a single individual, often not even a result of observation, but an often heard tradition that determines our judgment.
>
> "Freedom of judgment can be attained only when we learn to estimate an individual according to his own ability and character. Then we shall find, if we were to select the best of mankind, that all races and all nationalities would be represented."

Science, therefore, disposes effectively of the idea that individuals of a group are all alike in personality or that racial characteristics either of an individual or a group necessarily prevent assimilation. The question, then, is whether Americans whose parents or more remote ancestors happened to be born in Japan have taken advantage of American institutions and have made a conscientious effort to identify themselves with American ideals and American standards.

Fortunately, it is not necessary to guess or to resort to empty verbalism about the matter. The question has been thoroughly investigated a number of times. In 1937 W. C. Smith, Professor of Sociology at Linfield College, published his *Americans in Process: A Study of Our Citizens of Oriental Ancestry.* This book is not devoted to the study of those of Japanese ancestry alone, but it is eloquent with evidence relating to the assimilation, adjustment, effort, and patriotism of this group. A much more ambitious investigation, and one of the most thorough ever made of any group, was that made possible by a substantial grant from the Carnegie Corporation in 1929 to Stanford University. The work was carried out

under the direction of Professor E. K. Strong and resulted, beginning in 1933, in the publication of four volumes. It is a sad commentary on the degree to which perspective is lost when war hysteria grips a nation to realize that questions of loyalty and evacuation were settled on the basis of false Pearl Harbor rumors and panicky harangues of politicians, while factual reports of this nature were forgotten or ignored. Professor Strong and his large staff of co-workers used every possible source and device in gathering the data,—school records, crime records, business records, intelligence tests, aptitude tests, interviews, questionnaires, life histories, etc. The massive body of evidence cannot be given in full, but a few summary statements from Professor Strong's *The Second-Generation Japanese Problem* will indicate its nature:

> "The word 'assimilation' has two meanings—interbreeding and comprehension of political and social conditions. In the latter sense, the young Japanese are more readily assimilated than people of several European races; * * *" (p. 26).
>
> * * * * * * *
>
> "Evidently the Japanese immigrants have had far better education than that with which they have been credited, and their children are taking full advantage of the public schools of California. Such data as we have suggest that in this respect they average as well as whites" (p. 189).
>
> * * * * * * *
>
> "Mentally and morally the Japanese-Americans are similar to whites. The whites score slightly higher on tests of intelligence. This may be due to poorer acquaintanceship of Japanese-Americans with the English language in which the tests are given. * * * Morally the Japanese-Americans

are possibly superior to the whites; at least their record in delinquency and crime is better. * * *

"Considering their opportunities, the second generation have so far made an excellent record. They are eager for education; and they obtain higher marks, at least in junior and senior high school, than the average pupil. Records based on half of those who have graduated from Stanford University and the University of California during 1920-30 indicate that they are progressing satisfactorily.

"Physically there are differences between the two groups. The Japanese-American is shorter and scores lower in strength tests, but on the other hand his reactions are quicker. These differences are probably of little practical significance" (p. 252).

In another of this series of books, *Vocational Aptitudes of Second-Generation Japanese,* these representative statements occur. Particularly significant, in view of the many sweeping comments on "dishonesty, deceit, and hypocrisy" are a number of the excerpts:

"The vocational interests of Japanese and whites are very similar. Their interests correlate between .71 and .94, depending upon the educational status of the groups compared and upon the method of measuring the similarity" (p. 112).

* * * * * * *

"There is little or nothing in the data in this section to warrant the statement that Japanese as a class are tricky, deceitful, and dishonest. Their credit ratings are so nearly equal to those of the whites as to warrant the belief that they behave in practically the same way as their white competitors" (p. 147).

* * * * * * *

"On the basis of an adaptation of Voelker's honesty test, 12-year-old Japanese children obtained an almost perfect score (99.9), with Chinese second (87), in comparison with the score of 50 for Anglo-Saxons; * * *" (p. 154).

* * * * * * *

"We must conclude that the Japanese have made a fine record in this state as far as crime is concerned. As regards both juvenile delinquency and convictions for serious offenses, the records reveal less than their proportionate share of cases" (p. 173).

* * * * * * *

"Adaptability is an important trait, possibly one of the most important, in earning a living. The two rough measures of it, in terms of delinquency-crime and honesty, indicate that the Japanese are superior in this respect to many immigrant groups who have come to this country.

"The most important single measure of an individual is his general intelligence score. This is the best standardized of all psychological tests, and its significance is best established. Review of the literature makes clear that the two racial groups are about equal in this respect" (p. 177).

Another volume of the series is *The Japanese in California*. In view of unsupported charges about the regard for Japan which Americans of Japanese ancestry are alleged to have, a quotation or two from this volume may be apposite, if only to show the difference between prejudice and the results of investigation:

"Practically none of the second generation born and raised in the United States expressed any desire to go to Japan. Some feel that they may be forced to go in order to find positions, but few really want

> to do so if they can find an opening in this country. There is some question whether they will find that there really is any better chance for them in Japan, for competition is very keen there. Also, there seems to be actual antagonism there to American-born-and-raised Japanese, who are looked upon as Americans and not as Japanese" (pp. 122-23).
>
> • • • • • • •
>
> "On the whole, Japanese and whites differ very little regarding school subject best liked, school subjects they are planning to specialize in, and occupational aspirations" (p. 166).
>
> • • • • • • •
>
> "The United States-born second generation are predominantly Christian (47 per cent of the males and 56 per cent of the females) in contrast to 39 per cent of these young people who are Buddhists" (p. 169).

The Japanese were one of the latest immigrant groups to come to this country. The strides that the American-born children have made, in one generation, toward complete Americanization in outlook and ideals has won the attention and praise of all unbiased observers, and consequently there is voluminous literature on the assimilation and the assimilability of Americans of Japanese ancestry.

John H. Whittaker, who had much contact with these young Americans, had this to say many years ago:

> "It is absurd to contend that the Japanese cannot be assimilated when an educated and Christianized Japanese, born and reared on this soil, is almost invariably thoroughly American in his ideas and out of touch entirely with things Japanese. Instead of being incapable of Americanization, the writer has found the innocent belief of the young

> Asiatic born on this soil in the principles of democracy as taught in American schools and repudiated by American practice so embarrassing as to be pitiable. The young Asiatic considers himself an American. He is proud that he is an American and has no desire to be anything else than an American. Anyone who speaks and writes to the contrary has not mingled with the young Asiatic product of our American schools."[110]

Chester H. Rowell has asserted that nothing but race prejudice prevents the recognition of the degree to which assimilation has taken place:

> "There is nothing else against these children. They are just as bright as American children, speak as good English, and have the same manners and impulses; they are American citizens; and of course there is nothing economic in which to compete. It is sheer racial caste. * * *"[111]

Not long before the war began a young American of Japanese ancestry spoke for herself and her group to the Los Angeles District California Federation of Club Women. Her words were a plea that the degree to which the citizen group had identified itself without reservation with this country be realized. She said:

> "We cannot go to Japan, for over there we are foreigners and feel foreign. Our problems in the United States are the difficult ones of fitting ourselves in socially and vocationally, but this country we look upon as our home and our future. We are trying to do our part as American citizens. We ask you to do yours and give us that understanding we must have if we are to become part of the national picture. We have turned our backs on Japan

110. *Japan Review*, April, 1921, pp. 94-95.
111. *Survey*, May 1, 1926, p. 173.

> because we were born in America. We are thankful to live in a democracy and are trying to earn the recognition and respect of fellow Americans. We are proud to know that we have one of the lowest delinquency records of any race in the United States. We are trying to keep off relief rolls, to do our part in supporting the Community Chest and other social efforts.
>
> "In return we ask you to give us understanding, to see that we are treated with equality and justice and to tell those who may be skeptical that we are really good citizens." [112]

That American citizens of Japanese descent are loyal, and that their loyalty can be ascertained on the same basis and in the same manner as the loyalty of other citizens, is demonstrated by the action of the War Department.

On January 28, 1943, the War Department officially announced the organization of a special Japanese American battalion in the Army of the United States for combat service in an active theatre of war, the War Department announcement reading:

> "Loyal Americans of Japanese ancestry will compose a special unit in the United States Army. The War Department announced today that plans have been completed for admission of a substantial number of American citizens of Japanese ancestry to the Army of the United States. This action was taken following study by the War Department of many earnest requests by loyal American citizens of Japanese extraction for the organization of a special unit of the Army in which they could have their share in the fight against the nation's enemies."

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112. *Los Angeles Times*, Nov. 20, 1941.

Accompanying the War Department announcement was the following statement by Secretary of War Henry L. Stimson:

> "It is the inherent right of every faithful citizen, regardless of ancestry, to bear arms in the nation's battle. When obstacles to the free expression of that right are imposed by emergency considerations, those barriers should be removed as soon as humanly possible. Loyalty to country is a voice that must be heard, and I am glad that I am now able to give active proof that this basic American belief is not a casualty of war."

The War Department announcement concluded:

> "This combat team will include the customary elements of infantry, artillery, engineer and medical personnel. No effort will be spared in developing it into an efficient, well-rounded, hard-hitting outfit."

Following this announcement by the War Department, the President of the United States recognized the desires of "loyal American citizens of Japanese descent" to participate in the defense of American Democratic principles in the following statement directed to Secretary of War Stimson, under date of February 1, 1943:

> "The proposal of the War Department to organize a combat team consisting of loyal American citizens of Japanese descent has my full approval. The new combat team will add to the nearly five thousand loyal Americans of Japanese ancestry who are already serving in the armed forces of our country.
>
> "This is a natural and logical step toward the reinstitution of the Selective Service procedures which were temporarily disrupted by the evacuation from the West Coast.

"No loyal citizen of the United States should be denied the democratic right to exercise the responsibilities of his citizenship, regardless of his ancestry. The principle on which this country was founded and by which it has always been governed is that Americanism is a matter of the mind and heart; Americanism is not, and never was, a matter of race or ancestry. A good American is one who is loyal to this country and to our creed of liberty and democracy. Every loyal American citizen should be given the opportunity to serve this country wherever his skills will make the greatest contribution—whether it be in the ranks of our armed forces, war production, agriculture, government service, or other work essential to the war effort.

"I am glad to observe that the War Department, the Navy Department, the War Manpower Commission, the Department of Justice, and the War Relocation Authority are collaborating in a program which will assure the opportunity for all loyal Americans, including Americans of Japanese ancestry, to serve their country at a time when the fullest and wisest use of our manpower is all-important to the war effort."

In a further proclamation on the subject, the War Department announced to prospective volunteers amongst American Japanese:

"Americans of Japanese blood are wanted to fight for the United States like any other citizens. They are wanted for combat duty where they are fitted for combat duty and for war work where they are best suited for war work. They are wanted because the government and the Army are convinced of their loyalty. And they are wanted not less because of their ability as soldiers and as citizens doing useful work for the American community. You have superior qualifications for the kind of service in which it is intended to use you."

The War Department program to permit loyal American citizens of Japanese descent to serve in the armed forces extends to the Hawaiian Islands. On January 28th, Lieutenant General Delos C. Emmons, Commanding General of the Hawaiian Department of the United States Army and Military Governor of Hawaii, in announcing that he had been directed by the War Department to induct 1500 Americans of Japanese descent residing in the Hawaiian Islands into the United States Army, declared:

> "These volunteers will be formed into combat units on the mainland and will, when trained, be sent into an active theater of operation.
>
> "A large percentage of the officers will be citizens of Japanese ancestry.
>
> "Once in a great while, an opportunity presents itself to recognize an entire section of this country for its performance of duty. All people of the Hawaiian Islands have contributed generously to our war effort. Among these have been Americans of Japanese descent.
>
> "Their role has not been an easy one. Open to distrust because of their racial origin and discriminated against in certain fields of defense effort, they, nevertheless, have borne their burdens without complaint and have added materially to the strength of the Hawaiian area.
>
> "They have behaved themselves admirably under most trying conditions and have bought great quantities of war bonds and by the labor of their hands have added to the common defense.
>
> "In view of these facts and by War Department authority I have been designated to offer Americans of Japanese ancestry an opportunity to serve their country.
>
> "This opportunity is in the form of voluntary combat services in the armed forces. The manner or response and the record these men will establish as fighting soldiers will be one of the best answers

to those who question the loyalty of American citizens of Japanese descent in Hawaii."

Further, the Japanese American Citizens League submits that the cooperation and sacrifice of the Japanese people in permitting themselves to be uprooted from their homes and businesses on the West Coast—at a time when resistance would have been a natural course of action—in order to aid the war effort is more convincing proof of the deep-rooted loyalty of the Japanese to this nation than any artificial test which might be conceived to gauge mass devotion to country. This in spite of the fact that many American Japanese had reason to believe that the so-called "military necessity" was a victory for the economic and political pressure groups so common to California.

On June 15, 1942, Milton S. Eisenhower, then Director of the War Relocation Authority and now Associate Director of the Office of War Information, testified before a House subcommittee on appropriations to the effect that: "from 80 to 85 per cent of the Nisei, who are American-born citizens of Japanese descent and who have never been out of the United States, are loyal to the United States. They have attended only American schools with other American children. They know no other way. Many of them are in the American Army and Navy. Most of them can speak no other language but ours. They are thoroughly Americanized".

It is generally conceded by all thinking Americans that the great majority of Americans of Japanese ancestry are loyal to this country. The argument is that it was impossible to discriminate between the loyal and the disloyal at that time. We contend that if the War Department, in view of their special Japanese American combat team, can distinguish between the loyal and the disloyal

today, the Government could have distinguished between them at the time of the evacuation, especially in view of Mr. Eisenhower's statement regarding the relative proportion of the loyal and disloyal. We believe that American traditions and ideals, as well as the present war aims, required no less.

11. The discriminatory evacuation of American citizens of Japanese ancestry has violated the solemn pledges of high government officials and departments of government.

During the period of tension between the United States and Japan which preceded the attack on Pearl Harbor, Japanese nationals of long American residence sought to learn what their position would be in event of war. On December 4, 1941, Mrs. Eleanor Roosevelt gave an answer—with the official sanction of the State Department and of the Department of Justice, both of which she said she had consulted. Her words were:

> "I see absolutely no reason why anyone who has had a good record—that is, who has no criminal nor anti-American record—should have any anxiety about his position. This is equally applicable to the Japanese who cannot become citizens but have lived here for thirty or forty years and to those newcomers who have not yet had time to become citizens."[113]

The resolve of the government of the United States to pursue a policy of non-discrimination was not altered by the Pearl Harbor attack or the military situation that existed after it. The Justice Department knew better than

113. *New York Times*, Dec. 4, 27:6.

any other department of government the extent of subversive activity and the degree to which it might jeopardize national security. Therefore, when the Attorney General, on December 10, in announcing the number of enemy aliens who had been taken into custody stated, "No alien was apprehended, and none will be, on the score of nationality alone," it was plain that no evidence existed which justified the condemnation or discriminatory treatment of any class or group of aliens, to say nothing of any group of citizens.

Similar expressions came from members of Congress in the early days of the conflict. For instance, on December 14, 1941, Senator Joseph F. Guffey of Pennsylvania spoke on the subject of civil liberties in a nation at war and said:[114]

> "I am completely satisfied that we can take all necessary measures to combat subversive activity without violence to the Bill of Rights. In fact the Department of Justice has already had occasion to warn local executives throughout the Nation that molestation of foreign nationals is to be avoided. This step was necessary lest, in an excess of zeal, our local authorities should trample upon the rights of innocent individuals. * * * We are engaged in war, and we will permit no interference with it by anyone, but we will be just. The protection of our laws will remain available to all; our Constitution will continue to safeguard the weak as well as the strong."

No one will deny that it was the first days of the war, when a surprise attack had wrought great damage, when no one knew precisely where the Japanese forces might be, before the nation had mobilized, that the greatest peril to the country existed. Yet in mid-December the Attorney

114. Congressional Record, Dec. 15, Appendix.

General, on whose shoulders rested the responsibility for internal security, was able to declare.[115]

> "If we care about democracy, we must care about it as a reality for others as well as for ourselves; yes, for aliens, for Germans, for Italians, for Japanese, for those who are with us as well as those who are against us: For the Bill of Rights protects not only American citizens but all human beings who live on our American soil, under our American flag. * * *"[116]

On December 19, 1941, a statement of policy was issued concerning Axis aliens by the Attorney General's office. It was an eloquent reaffirmation of the democratic position already taken. It reads:

> "The United States is now at War. Every American will share in the task of defending our country. It is essential at such a time as this that we keep our heads, keep our tempers—above all, that we keep clearly in mind what we are defending.
>
> "The enemy has attacked more than the soil of America. He has attacked our institutions, our freedoms, the principles on which this nation was founded and has grown to greatness. Every American must remember that the war we wage today is in defense of these principles. It, therefore, behooves us to guard them most zealously at home. * * *
>
> "The great majority of our alien population will continue to be loyal to our democratic principles if we, the citizens of the United States, permit them to be.
>
> * * * * * * *

115. Address at dedication ceremonies of the Thomas Jefferson room in the Library of Congress Annex; printed in Congressional Record, December 16, Appendix.

116. Address at dedication ceremonies of the Thomas Jefferson room in the Library of Congress Annex; printed in Congressional Record, December 16, Appendix.

"So long as the aliens in this country conduct themselves in accordance with law, they need fear no interference by the Department of Justice or by any other agency of the federal government. They may be assured, indeed, that every effort will be made to protect them from any discrimination or abuse. • • •

"Inevitably, there are some among our alien population who are disloyal. The federal government is fully aware of the dangers presented not only by such persons but also by disloyal citizens. The government has control of the activities of these elements. At no time, however, will the government engage in wholesale condemnation of any alien group.

• • • • • • •

"The defense of our country will be hurt, not helped, by any persecution of our non-citizens. If we create the feeling among aliens and other foreign-born that they are not wanted here, we shall endanger our national unity. Such an impression could only give aid and comfort to those enemies whose aim is to infect us with distrust of each other and turn aliens in America against America. To do this would be to defeat what we ourselves are defending."[117]

To halt discrimination against aliens in industry the President of the United States released a statement on January 2 which contained these memorable words:

"Remember the Nazi technique: 'Put race against race, religion against religion, prejudice against prejudice. Divide and conquer.'

"We must not let that happen here. We must not forget what we are defending: Liberty, decency, justice. We cannot afford the economic waste of services of all loyal and patriotic citizens

117. Printed in full in the *Survey Graphic*, January 1942, p. 13.

and non-citizens in defending our land and liberties."[118]

As late as February 1, 1942, Mr. Biddle was confident that there would be no resort to the dubious luxury of hysteria and mass reprisal, for in his address of that date over the Columbia Broadcasting System he scored the very policy which was to be adopted soon afterward:

> "At the same time I want to point out that persecution of aliens—economic or social—can be a two-edged sword. Such persecution can easily drive people, now loyal to us, into fifth-column activities. Economic discrimination against loyal aliens deprives us of skills and manual labor which will become more important as time goes on. It also deprives these people of a livelihood. The logical conclusion of a policy of discrimination is to make of these people public charges. It is entirely unnecessary. And don't forget there are still many Americans in Axis and Axis-controlled countries. Let's not give the Axis countries any excuse for retaliation against innocent Americans living abroad.
>
> "And let us remember, also, that the great majority of the so-called alien enemies came to our shores for the same reason that many of our fathers came—to escape persecution; to enjoy the privileges and obligations of democracy; to raise their children in a free world. These people are loyal to our ideals and loyal to our form of government. Let's encourage that loyalty rather than discourage it. Let us judge people by what they do and not by what they are."

Before the West Coast evacuation of persons of Japanese ancestry, sentiments and pledges of this order

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118. Reprinted in Hearings before the Select Committee Investigating National Defense Migration, House of Representatives, Seventy-Seventh Congress, Second Session (Tolan Committee Hearings), Part 29, p. 11,042.

came from nearly every important official in our government. This expressed determination to avoid group condemnation and blanket discrimination centered about the status of *enemy aliens,* it will be noted. Our national leaders, unaware of the strength of organized anti-orientalism on the West Coast and unprepared for the malicious and false rumors that were to inflame public opinion, did not envisage that *American citizens* as well would be drawn into the orbit of intolerance.

This country, now dedicated to a fight for the four freedoms, continues to assert its pre-evacuation principles. In his speech of June 29, 1942, delivered at the very moment when a minority group against whose members no charges had been lodged and for whose members no hearings were being provided was being removed and detained under threat of legal penalty, Paul V. McNutt still found voice to say:[119]

> "Discrimination—based on anything but a man's sheer worth—must go. Discrimination against every race must go—just as economic discrimination must go • • •
>
> "There is a Constitution—the Constitution of the United States—which makes the rights of every citizen clear—a Constitution which establishes those rights in law.
>
> "There is a Bill of Rights without which the little people of these United States would never have ratified that Constitution • • •
>
> "It is unthinkable that our sacrifices shall be in vain or our liberties jeopardized by any provincial prejudices."

These are brave words, but actual events have robbed them of their fire and of conviction. Provincial prejudice *has* raged and our liberties *have* been jeopardized.

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119. *New York Times,* June 29.

12. American principles have been gravely compromised by evacuation.

The seriousness of what has been done, both from the legal and the social point of view, is recognized by all. The Tolan Congressional Committee, in its first report, seriously questioned the constitutionality of the evacuation policy when it wrote:

> "Recognizing the duties and responsibilities of the military, this committee is also impressed by the fundamental fact that wartime does not automatically suspend the Constitution. Justice is still administered by the courts of our land and martial law has its justification only when these courts are removed by the practical exigencies of warfare. Cases of rebellion or invasion permit a suspension of the writ of habeas corpus under the Constitution, and perhaps it requires no stretch of the imagination or of the law to place within the latter category the recent predatory incursions of enemy submarines and airplanes. But suspension of this writ does not abrogate the fifth and fourteenth amendments, which provide for due process and equal protection of the laws. Even aliens are guaranteed certain protections afforded by the Constitution.
>
> "The most complicating factor in the present situation is that two-thirds of the Japanese ordered to evacuate from designated military areas are citizens of the United States by virtue of their birth in this land. The Executive order of the President empowering the military to designate strategic areas and to prohibit or limit the presence of persons in such areas does not declare that a state of martial law exists in these areas. It is silent on the constitutional rights of citizens. It was frankly an expedient impelled by the critical situation on the west coast. Under our form of government, any questions raised as to the constitutional status of

> persons affected must ultimately be resolved by the courts".[120]

Notwithstanding the announcement of the Western Defense Command that it was military necessity which dictated the removal of Americans of Japanese ancestry from the Pacific slope, one is forced to question the validity of that argument in the light of Lieutenant General John L. DeWitt's statement on April 13, 1943, before a House of Representatives Subcommittee on Naval Affairs, when he declared, according to an Associated Press dispatch:

> "A Jap's a Jap" and "it makes no difference whether he is an American citizen or not * * * I don't want any of them. We got them out. They were a dangerous element. The west coast is too vital and too vulnerable to take chances. * * * You can't change him (American citizens) by giving him a piece of paper. * * *"[120a]

If he has been correctly quoted by the Associated Press, and there is no reason to believe that the press report is incorrect, General DeWitt, who is the commanding general of the Western Defense Command and the individual charged by the President with the responsibility of determining the need for evacuation, holds that Americanism is not a matter of the mind or heart but is determined by race and ancestry. This is a dangerous concept, a line of thought and action pursued by our enemies—by Hitler who believes in the master race and by the Tokyo militarists who have announced the "holy mission" of the Japanese race. It is a concept which is the antithesis of the democratic ideals of the American nation.

General DeWitt's bitter declaration throws open the entire question of the evacuation by fiat of 70,000 Ameri-

120. House Report No. 1911, 77th Congress, 2d Session (Tolan Committee Report), March 19, 1942, pp. 13-14.

120a. *Washington Post*, April 14, 1943.

can citizens without trial or hearing from their homes along the west coast. The army had declared the mass evacuation necessary because of military necessity and the omission of individual hearings had been explained by the fact that there had been not enough time for such tests of loyalty in the face of the existing military situation. It now appears, however, that wholesale evacuation and the abridgment of the citizenship rights of an entire American minority group was born of the blind race prejudice of a single individual.

If a single individual's personal prejudice determined the destinies of so many people, it is indeed a grave compromising of American concepts.

13. Evacuation has been detrimental to the war effort.

Evacuation has been such a sharp reversal of professed governmental policy and such an obvious infringement of personal liberties and constitutional guarantees that only the most conclusive evidence of military necessity and of unquestionable relation to the successful prosecution of the war can justify it. Such conclusive evidence cannot be produced. What can be proved, however, is that the exact opposite is true. It can be demonstrated that evacuation has been most detrimental to the war effort and that, unless this appeal to the court succeeds, its shadow will follow this country to the peace table and into a troubled future.

At a time when all the resources and the highest possible national income is required for the war effort, evacuation has dissipated the possessions and work opportunities of an industrious group. The farmers alone of Japanese ancestry have lost $100,000,000 in investments[121] and millions more have disappeared in the sacrifice of businesses

121. *New York Times*, March 10, 1942.

and personal property. The products and services which these people can offer have been sadly missed; the area from which they were excluded suffers from an acute labor shortage; the agricultural crops in which they specialized have shrunk woefully in quantity and have risen markedly in price. To cite one example: *The Los Angeles Daily News,* February 17, 1943, reported that *The Federal-State Market News Service,* in its annual report on the Southern California fruit and vegetable situation, revealed that "because of the expulsion of the Japanese, consumers in this area paid $20,000,000.00 more for 10,000 truckloads less of perishables during 1942".

Not only has the government lost by the forced impoverishment and enforced idleness of this section of the population but the direct costs to the nation have been considerable as well. In addition to the actual expense of evacuation, the appropriation of the War Relocation Authority for its first year has been $70,000,000. A people who toiled in the national interest and who contributed magnificently during the First World War have become, through no fault of their own, public charges at this critical time when every hand and every talent is so urgently needed.

If this country has lost heavily in manpower, wealth and productivity as a result of the evacuation, Japan has gained a signal victory in the battle of propaganda. And in the exploitation of evacuation news, the Italian and German propagandists are giving the Japanese excellent support.

When Italian diplomats and newspapermen arrived in Rome from the United States in May, 1942, the Tokio radio made much of their tales of the evacuation:

> "Japanese residents in the United States, including Americans of Japanese ancestry, were subjected

to indescribable humiliation and shocking treatment, including lynching at the hands of enraged American mobs, when the outbreak of the Greater East Asia war on December 7 uncapped a wave of anti-Japanese sentiment throughout the United States, * * *.

"Questioned regarding treatment of Japanese residents since the outbreak of war, members of the Italian party said Japanese, irrespective of whether they were Nisei [American born] or not were being subjected to much harsher treatment than Germans and Italians, and huge numbers of them were being interned in concentration camps, * * *.

"Members of the party went on to express the belief that it was apparently the policy of the United States Government not to leave a single Japanese resident, whether he be an American of Japanese ancestry or not, at large."[122]

Soon after this the *Far Eastern Survey*, in an editorial titled "Fuel for Japanese Propaganda", discussed this broadcast and its implications:

"Despite the exaggerations of this story, there is good reason to believe that the United States' policy toward residents of Japanese ancestry is inadvertently playing into the hands of Tokyo propagandists, nullifying our own propaganda efforts, and perhaps affecting the fate of Americans in areas controlled by Japan. Certainly the evacuation of all Japanese, including American citizens born in this country, from the Pacific Coast constitutes harsher treatment than that accorded to Germans and Italians. Tokyo will not be slow to play up any evidence of racial discrimination in its appeal for the sympathies of Filipinos and other Asiatics."[123]

122. *New York Times*, May 23, 1942. From Japanese broadcasts recorded by the Associated Press in New York.
123. *Far Eastern Survey*, June 1, 1942, p. 122.

On August 3, the German-controlled Rome radio utilized the evacuation theme in an Italian-language broadcast directed to the United States:

> "From now on all Americans who love their country will be persecuted without pity. Roosevelt in his folly for bloodshed, has already contrived to have found by his G-men, a police force entirely made up of gangsters, a plot which would have as its aim to turn over the entire Pacific Coast to the Japanese. He has, his press states, that the guilty number 100,000. One can thus already foresee that each defeat he suffers at the hands of the tripartite powers will cost the lives of further innocents."[124]

In the August 28, 1942 issue of the *United States News* further evidence is given of the manner in which evacuation has played into the hands of the Axis:

> "Japan quotes a returning Japanese resident of Los Angeles, as saying that, every time Japan won a victory, more Japanese were interned in America on the pretext of Fifth Column activities, that fear of Japanese air attack was beyond description in Los Angeles, that Jewish traders bought up the household goods of interned Japanese for a song."[125]

That evacuation has been used as a foil and a rationalization for Japan's treatment of American prisoners has been confirmed by *Victory*, the official builetin of the Office of War Information:

> "Obviously intended both as an excuse for the treatment of American prisoners in Japan and to

124. *New York Times*, August 4, 1942.
125. "The American Picture as Painted by the Axis", p. 20.

counteract the effect of the testimony of returned Americans, the Tokyo radio began stating:

"'The treatment accorded Japanese nationals in the United States since Pearl Harbor will go down in history as a smear on the American claim to humanitarianism.'

"While the Japanese propaganda machine was trying to disclaim the atrocities meted out to American prisoners, the Tokyo radio broadcast a threatening editorial from the Shanghai Times, stating, 'The Anglo-American nationals in Japan and occupied China should be herded together and driven into interior regions where there are no modern facilities.'"[126]

The parallel between what has been done in this country and what Tokyo threatens to do is alarming.

Lately, an interesting analysis of Japanese propaganda and our difficulty in counteracting it has been made. Again, it has been found that the evacuation is our greatest handicap, as this citation indicates:

"It is obvious that Japan's domestic propaganda is not adequately challenged by the various arguments just cited. The Tokyo radio, in broadcasts made available by the Office of War Information, appeals constantly to the Japanese people's hatred and fear of the United States and Great Britain. Race issues particularly are emphasized, with frequent recitations of instances of discrimination against Orientals in this country and much stress on the exclusion of Asiatics under our immigration law of 1924. Exaggerated or wholly fictitious accounts of our 'mistreatment' of evacuated Japanese-Americans are headlined. The war is blamed on our imperialistic desire to maintain white suprem-

126. *Victory*, September 29, 1942, p. 30.

> acy over East Asia. Instances of discrimination against progress in America are played up and interpreted as evidence of the hypocrisy of our democratic pretensions. * * *
>
> "The best answer we could make to Japan's appeal to racial hatred would be action proving that the Japanese propagandists are wrong. The indiscriminate internment of all Nisei (American citizens of Japanese parentage) makes us extremely vulnerable, for example, in view of our government's liberal treatment of Italian citizens and even of Germans resident in America."[127]

Not only has evacuation, with its aping of totalitarian methods, been a source of deep satisfaction to our enemies and a mainspring of their propaganda, but it has been the cause of much uneasiness and dissatisfaction among our minority groups at home, and so has been responsible for division and confusion at a time when national unity and faith in democracy are essential. One of the best known students of our national life has stated categorically:

> "The treatment of the Japanese on the Pacific coast has caused alarm and uneasiness among those of foreign extraction. The War Relocation Authority may perform its functions in the most humane fashion possible, but the fact remains that American citizens have been uprooted from their homes and placed in detention quarters."[128]

Members of American minority groups have not been slow to voice their disapproval over what has taken place

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127. Selden C. Menefee, "How to Speak to Japan." *The Nation*, January 2, 1943, pp. 17-18.

128. Harold F. Gosnell, "Symbols of National Solidarity", *The Annals of the American Academy of Social and Political Science*, September, 1942, p. 160.

and have made logical comparisons of their own positions, present and potential, with the treatment accorded persons of Japanese ancestry. In the official organ of the National Association for the Advancement of Colored People, one of the most eloquent writers for minority groups presents the mood of the largest American minority on this issue:

> "The hapless citizens who have been deprived of their constitutional rights and constitutional protection have the misfortune to include among their ancestors persons of a non-white country with which the United States is now at war. It is the 'non-white' which must be emphasized. American citizens of German, Italian, Hungarian, Bulgarian, or Roumanian ancestry have not been legally discriminated against. It is only our citizens of Japanese ancestry who have been put into concentration camps. They are not 'white.' They are 'not to be trusted.' * * *
>
> "What has happened to these Americans in recent months is of direct concern to the American Negro. For the barbarous treatment of these Americans is the result of the color line. This cannot be too often repeated or too clearly understood. These men, women, and children have been taken from their pleasant homes and long-cultivated farms and businesses because their skins are yellow and their eyes have the tell-tale Mongolian eyefold. Americans of German or Italian descent are not being discriminated against. Wendell Willkie and Fiorello LaGuardia are not being stuck into filthy and noisome shacks in vile concentration camps because they are of German and Italian ancestry; they are white. * * *
>
> "Negroes have been told again and again: 'Work quietly, be industrious, mind your own business, and you will get justice even in America.'

That is what these yellow-skinned Americans believed. They worked, cheerfully and industriously. They turned deserts into beautiful and fertile farmland, grew vegetables and fruits for themselves and for others. They distinguished themselves at school, abstained from politics, had the lowest crime-rate of any group in the entire country. * * *

"What has been their reward? They have been plundered of everything, and crowded in concentration camps fit only for pigs. If Westbrook Pegler and the southern senators have their way, they will be deported to Japan when the war is over. There is already a move to deprive them of citizenship—a move headed by the 'Native Sons of the Golden West' and the Senate's Immigration Committee. * * *

"* * * It is significant that southern senators and congressmen are among the most rabidly anti-Japanese. For, if Asiatic-Americans can be reduced to bondage, deprived of citizenship and of property, the same thing can be done to Afro-Americans and to Jews.

"This is an integral part of the struggle for human and racial equality. It concerns every believer of democracy and human equality, regardless of color. 'For even as ye have done it unto the least of these my brethren, ye have done it unto me.' "[129]

Since no people have suffered more at the hands of the Japanese military or have offered more heroic resistance to their assaults than the Chinese, it is interesting to note the reactions of persons of Chinese ancestry in this country to this method of handling those of Japanese ancestry. A Chinese scholar, Dr. Cheng Kun Cheng, submitted this

129. Harry Paxton Howard, "Americans in Concentration Camps", *The Crisis*, September, 1942, pp. 281-284.

representative statement to the Tolan Committee during its West Coast hearings:

> "I am a citizen of the Republic of China. I was born and brought up there. I was formerly assistant professor at the University of Amoy in South China and now I am teaching at the University of Washington. I am deeply interested in the war in my country in particular and in the Pacific in general * * * I am also convinced that, in order to prevent similar calamities from wreaking havoc among the people of the world in the future, one of the most effective steps to be taken by the Allied Nations, besides relentless prosecution of the war, is to establish in their respective territories an example of magnanimity in their treatment of the enemies and their descendants.
>
> "During my travels in Free China 1939-41, I found that the leaders in Chungking were very farsighted in having adopted the policy of inculcating in the minds of the Chinese masses discrimination between the Japanese warlords and the Japanese people. Since the surprise attack on Pearl Harbor, I have been watching closely the general policy of the Government of the United States toward the Japanese aliens and the American-born Japanese.
>
> "Judging from what I saw and heard in this Pacific Northwest, the consensus of opinion here seems to favor a wholesale removal of the alien and American-born Japanese. This, so far as I could see, is essentially the result of deep-rooted racial prejudice on the part of the average American who either could not or would not allow himself to be convinced that biologically the Japanese are not much different from himself. And it is this prejudice which has manifested itself in newspaper editorials and over the radio in this part of the country during the past two months."[130]

130. Hearings before the Tolan Committee, Part 30, pp. 11606-7.

American-Chinese have translated their protest and sympathy into action, as the following example reveals:

> "The other familiar argument is that the Japanese could not be protected against possible outbreaks of mob violence. But the principle that the remedy for such a threat lies not in the protection of the threatened group but in taking it into 'protective custody' has very ominous implications for every racial minority within our frontiers. With characteristic far-sighted wisdom some of the Chinese in the west seem to have recognized this point; the Chinese community in Salt Lake City took up a contribution for the relief of Japanese evacuees. This might seem to be an act of extraordinary idealism, considering what Chinese in China have suffered at the hands of the Japanese. But it is quite probable that the Chinese action was also motivated by the consideration that what happened to the Japanese today might happen to them tomorrow, under the influence of some wave of racial bigotry."[131]

That a great democracy should stoop to practice racial discrimination in the midst of a struggle to secure the four freedoms has come as a shock and disillusionment, not without unpleasant implications for the future, to thoughtful Chinese. By such acts as evacuation we are sowing the seeds of ugly convictions, such as this disturbing prediction of Dr. Lin Yutang, "Present conditions are building up for a third World war on racial lines, very likely with the Germans on the side of the Anglo-Saxons, against the vast yellow and black populations."[132]

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131. William Henry Chamberlin, "Civil Liberties: Slogan or Reality?" *The Christian Century*, January 13, 1943, pp. 43-45.

132. *San Francisco Chronicle*, May 17, 1942.

Against this dangerous drift and tide, this loss of manpower, this senseless gift to enemy propagandists, this prodigal waste of goodwill and unity at home, this opportunistic drive of groups long organized for hate to inflate their fanatic grudge into a national and international issue, the decision of this court can act as a mighty barrier, one that may yet turn our minds toward our cause and our faces toward the actual foe.

Conclusion

American citizens of Japanese descent, for whom the Japanese American Citizens League speaks, bear no rancor or ill will toward their Government, although they feel that they have been made the victims of war prejudices and hysterias; nonetheless, they will continue to offer their lives to their country—the United States of America—for service in our armed forces, or for any other similar war effort, despite this, or similar, discrimination or injustices, in the hope that they may become "Better Americans in a Greater America".

But they look to this Court, as the guardian of the liberties of all the people of the United States—of which Japanese Americans are a living and integral part—with confidence to protect them from such discrimination as this, which is so alien to the American way of life, not for their sake alone, but also for the sake of every minority racial group in American life.

In this brief, we believe we have presented a fair, but by no means complete, survey of the sociological, economic and constitutional problems presented by the evacuation from the West Coast of American citizens of Japanese ancestry. This action, unprecedented in American history,

is a challenge both to our Constitution and to the lofty principles for which our country has dedicated itself in this global war.

Respectfully submitted,

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* This brief was prepared with the active cooperation of Mike Masaoka, National Secretary and Field Executive, J.A.C.L.

Appendix A

PORTION OF STATEMENT BY MIKE MASAOKA, SECRETARY, JAPANESE AMERICAN CITIZENS LEAGUE, EXPLAINING WHY HE VOLUNTEERED. FROM THE PACIFIC CITIZEN, OFFICIAL PUBLICATION OF THE JAPANESE AMERICAN CITIZENS LEAGUE, FEBRUARY 4, 1943:

I have volunteered for service in the Army of the United States, and specifically for the special combat team composed of loyal Japanese Americans which is now being organized by the War Department.

As an American citizen, and particularly an American citizen of Japanese ancestry, I could do no less.

I volunteered because I had to keep faith.

I had to keep faith with "my" America, an America which has granted me innumerable benefits far beyond those meted out to other peoples in other parts of the world and an America which still holds greater promise for justice, equality and opportunity in the years to come for our people and for me than any other country. I know that we, as a minority group, have been called upon to bear—what seems to us—far more than our share of hardships because of the circumstance of war. I know that this America of ours will win the war and that this nation, under God, will be greater than ever. I know that the injustices and sacrifices which we have been forced to undergo will be compensated for in some way, provided that we prove now our right to that compensation. It has often been my personal opinion that too many of us summarily expect and demand every conceivable right and privilege of citizenship without being willing to accept and discharge the accompanying obligations and responsibilities. I believe that the obligation to bear arms in the de-

fense of home and country is one way of assuming that responsibility.

I had to keep faith with myself. I have to live with myself, and so I always want to be in a position to be proud of what I have done. I have made, and will make, many mistakes. But I want to be able to say that those mistakes were made not because I was afraid of death, but because I knew that I was right and honest with myself. I want to be able, in the years to come, to know that my children and their children after them will not be forced to suffer, as we have suffered, because I was not visionary enough, or courageous enough, to be baptized under the fire of enemy guns and to prove beyond all doubt that we who are Americans in spite of our Japanese faces are loyal to the land of our birth, even unto death.

I volunteered because I have confidence in this government and the majority of the American people. The very fact that the army itself, when it is pressed with the serious problems of fighting a global war, has come forth with this plan which constitutes an affirmation of their trust and faith in us is more than indicative of their desire to aid us regain our rightful status. This action on the part of the most important department of our government in wartime, when ordinary volunteering for the average citizen has ceased, is the greatest endorsement which our group could receive.

I have a stake in America. I believe that it is worth fighting for. As an American, as the national secretary and field executive of the JACL, I volunteered because I sincerely feel that I could do no less.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

GORDON K. HIRABAYASHI
vs.
THE UNITED STATES OF AMERICA. } No. 870.

MINORU YASUI
vs.
THE UNITED STATES OF AMERICA. } No. 871.

BRIEF *AMICUS CURIAE*

AMERICAN CIVIL LIBERTIES UNION,
Amicus Curiae.

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The Interest of the American Civil Liberties Union

The American Civil Liberties Union is a national organization devoted to the protection of the civil rights of the people of the United States, with particular emphasis upon those liberties guaranteed by the Bill of Rights.

Pursuant to its purpose, the American Civil Liberties Union, through its counsel, has appeared on many occasions, most frequently *amicus curiae*, in judicial proceedings, in support of the guarantees in the first ten amendments to the Constitution of the United States.

In the instant cases we are concerned primarily with maintaining, during days when our nation faces grave

military danger, and our Constitution serious stress and strain, the American constitutional way of life for which we are fighting on world-flung battle lines.

Our sole concern in these cases is in what we believe to be unwarranted and unconstitutional exercise of military power, abridging rights of American citizens of Japanese ancestry in violation of due process of law, because of the discriminatory military orders directed against persons solely because of their race or ancestry; which were, in addition, unaccompanied by any hearing of any kind. Such orders, in our opinion, violate the "rudimentary demands of justice and fair play."

More particularly our position upon the removal of citizens has been thus publicly stated by the Union:

> 1. The government in our judgment has the constitutional right in the present war to establish military zones and to remove persons, either citizens or aliens, from such zones when their presence may endanger national security, even in the absence of a declaration of martial law.
>
> 2. Such removals, however, are justified only if directly necessary to the prosecution of the war or the defense of national security.
>
> 3. Except in cases of immediate emergency, the necessity for such removals should be determined by civilian authorities, and such removals should be carried out by civilian authorities.
>
> 4. Such removals should be carried out in a manner, and based upon a classification, having a reasonable relationship to the danger intended to be met.
>
> 5. Each person affected should have an opportunity of showing that he does not come within the necessities of the situation; and hearing boards should be established to pass upon all such claims.

6. Persons so removed, unless held for other reasons, should be allowed full liberty in the United States outside of such military zones. Their property rights should be fully protected, and reasonable arrangements should be made for their resettlement in places of their own choosing outside of such zones.

Our position, fundamentally, is that in the absence of circumstances warranting martial law and in the absence of the declaration of martial law, removal of citizens from any area in the United States, deemed undesirable in any area, is the function of the *civil* rather than the military authorities. The exercise of military authority in the cases at bar seems to us to be not only unprecedented in any democratic country; but to lack warrant in our constitutional history. Always it has been our proud boast that the military are at all times subordinate to the civil powers—except only when the civil authorities were unable to function because of insurrection or invasion. Thus in the constitutions of the original states, seven contained express provisions to the effect that the military was under subordination to the civil power. All such provisions were similar to the one in the Maryland Constitution (1776), "That in all cases, and at all times, the military ought to be under strict subordination to and control of the civil power". In addition to the other seven constitutions, the Vermont Constitution also had the subordinating provision.

Our approach to this case is one of substantial accord with the views of this Court as expressed in a war three-quarters of a century ago and in this world war.

In the Civil War:

"The Constitution of the United States is a law for rulers and people, equally in war and in peace

and covers with the shield of its protection all classes of men, at all times and under all circumstances." (*Ex parte Milligan,* 4 Wall. 2, 13.)

This War:

"We are not here concerned with any question of the guilt or innocence of petitioner. Constitutional safeguards for the protection of all who are charged with offenses are not to be disregarded in order to inflict merited punishment on some who are guilty." (*Ex parte Quirin,* Oct. 29, 1942, 87 L. Ed. (Adv. Op.) 1, 7.)

I

Military orders, directed only against persons of Japanese descent, as affecting American citizens, offend against the minimum guarantee of the equal protection of the laws, as incorporated in the due process clause of the Fifth Amendment.

It is true that the due process clause of the Fifth Amendment contains no such guarantee of the equal protection of the laws, as expressly provided for in the Fourteenth Amendment. Nonetheless it has been held that due process of law includes a certain minimum assurance of equality under the law.

Truax v. *Corrigan,* 257 U. S. 312, 331, so indicates:

"It (due process of law), of course, tends to secure equality of law in the sense that it makes a required minimum of protection for everyone's right of life, liberty and property, which the Congress or the legislature may not withhold. Our whole system of law is predicated on the general fundamental principle of equality of application

> of the law, 'All men are equal before the law'; 'This is a government of laws, and not of men:' 'No man is above the law,' * * * are all maxims showing the spirit in which legislatures, executives, and courts are expected to make, execute, and apply laws."

With the exception of approximately 125 persons, not enemy aliens, excluded from the Pacific Coast, the only persons similarly removed have been those of Japanese ancestry, approximately 70,000 of whom are American citizens.

The 125 thus excluded were ordered removed after only hearings. None of the 70,000 American citizens of Japanese descent was accorded a hearing of any kind.

Why this apparently discriminatory treatment? Was the discrimination due to in its entirety, or dominantly, because of racial prejudice?

There is much convincing evidence to that effect.

That bitter race prejudice against Orientals has characterized the attitude of many powerful political and pressure groups on the West Coast, and particularly in California, is rather well known. According to the Tolan Committee, agitation against Japanese, both citizens and aliens, has been a frequent factor on the Pacific Coast scene, flaring up in 1913 and recurring between 1919 and 1924 (see Tolan Committee Fourth Interim Report, supplement part 1 section A, "History of Japanese Settlement in the U. S.," p. 59).

Evidence was submitted to the Tolan Committee that race prejudice was a dominant factor in causing the evacuation of the Japanese from the Pacific Coast, citizen and alien alike. Thus the Secretary of the California State Congress of Industrial Organizations, Mr. Louis

Goldblatt testified before the Tolan Committee (Fourth Report, p. 149):

> "We feel, however, that a good deal of this problem has gotten out of hand, Mr. Tolan, inasmuch as both the local and State authorities, instead of becoming bastions of defense, of democracy and justice, joined the wolf pack when the cry came out 'Let's get the yellow menace.' As a matter of fact, we believe the present situation is a great victory for the yellow press and for the fifth column that is operating in this country, which is attempting to convert this war from a war against the Axis Powers into a war against the 'yellow peril.' We believe there is a large element of that particular factor in this present situation.
>
> "I am referring here particularly to the attack against the native-born Japanese, an attack which, as far as we can find out, was whipped up. There was a basis for it because there has always been a basis on the Pacific coast for suspicion, racial suspicion, which has been well fostered, well bred, particularly by the Hearst newspapers over a period of 20 to 25 years."

Similarly Dr. Eric C. Bellquist of the Department of Political Science of the University of California testified (Tolan Committee Fourth Interim Report, p. 150):

> "Here on the coast we have a radio commentator who reviews the news at 9 o'clock in the morning. For some time he has been urging that every Japanese, alien or citizen, be transplanted to the other side of the Rockies. In appeal after appeal he has incited the people and aroused their suspicion. We have a former far eastern newspaper correspondent who, toward the end, had difficulties in Japan and has since been reviling the Japanese in our country and urging restrictive action of

far-reaching scope against both aliens and citizens. We have certain interests in the State—some agricultural, some 'patriotic,' some closely affiliated with certain newspapers—which have long been hostile to orientals in general as well as other aliens, and which have now found a golden opportunity to come out against the Japanese on the Pacific coast. City councils and county boards of supervisors have been passing restrictive ordinances, petitioning the Congress to enact legislation against our Japanese, and in many respects take over functions properly belonging to the National Government. The mayors of our two large cities, as well as many smaller ones, have lost their composure along with the rest. The State personnel board at Sacramento has sought to take action contravening the Constitution as well as the expressed sentiment of our highest officials, including the President.

Altogether, as the committee has witnessed, the State of California, as well as Oregon and Washington, has been giving a demonstration of lack of balance and outright intolerance which will blacken its record for many years to come. If our public authorities have thus succumbed to hysteria, one can well understand, if only deplore, the housewives who dismiss Japanese gardeners and servants, and farmers who discharge help because of citizenship or extraction. On the whole, the public has not shown so much hate or spite, except as it has been incited to do so. But pressure groups and shortsighted politicians facing an election year are out for blood and wholesale internment. Jingoes are endeavoring, under the cover of wartime flag-waving patriotism, to do what they always wanted to do in peacetime—get rid of the Japanese."

Dr. Bellquist further testified:

> "In brief, up to the end of the year, there had been no panic and little infringement upon rights and liberties. The people were calm and went about their business in getting ready to face the war, maintain morale, and put forth the common effort necessary to meet and defeat the forces of brutalitarianism.
>
> This sound common-sense American attitude of doing the job and paving the way for victory was not allowed to continue, however. In January the commentators and columnists, professional 'patriots,' witch hunters, alien haters, and varied groups and persons with aims of their own began inflaming public opinion. Reason was not to be allowed to prevail. Clamor for un-American restrictive measures became rife. The ancient western curse of vigilante rule was once more raising its head.
>
> In short, there was no popular clamor for comprehensive restrictions or mass evacuation. Not until inflammatory commentators on the 'enemy alien menace' undermined popular confidence did the present hysteria arise. I cannot believe that this is just a matter of chance. * * *"*

That Lt. Gen. John L. DeWitt, the commanding general who issued the orders challenged herein, was equally the victim of such race prejudice, is proven by Gen. DeWitt himself. On April 13, 1943, Gen. DeWitt testifying at San Francisco before the House Naval Affairs Subcommittee expressed his views:

> "A Jap's a Jap and it makes no difference whether he is an American citizen or not."

Gen. DeWitt emphatically opposed efforts to bring back some of the Japanese to the West Coast.

---

* *Tolan Committee Hearings*, 4th Interim Report, p. 150 ff.

It seems clear accordingly that the orders at issue in these proceedings were the result not of military necessity, but of race prejudice.

II

Failure to accord hearings to appellants and other American citizens of Japanese ancestry violates due process of law.

The need of a hearing as an indispensable prerequisite to due process seems well established.

The minimum requirements of due process are outlined in *Truax* v. *Corrigan*, 257 U. S. 312:

> "The due process clause requires that every man shall have the protection of his day in court, and the benefit of the general law,—a law which *hears* before it condemns, which proceeds not arbitrarily or capriciously, but upon *inquiry*, and renders judgment *only after trial*, so that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society."

The court then cited *Hurtado* v. *California*, 110 U. S. 516, 538, at which we find:

> "Law is something more than mere will executed as an act of power. It must be not a special rule for a particular person or a particular case, but, in the language of Mr. Webster, in his familiar definition, 'The general law, a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial,' so that every Citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society. * * *'"

In a later case, in *Holden* v. *Hardy*, 169 U. S. 360, 389, the court defined due process as including "certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard, as that no man shall be condemned in his person and property *without due notice and an opportunity to be heard in his defense.*"

In a recent decision Justice Cardozo, in *Palko* v. *Connecticut*, 302 U. S. 309, 327, stated:

> "Fundamental too, in the concept of due process; and so in that of liberty, is the thought that condemnation shall be rendered only after trial."

More recently in *Hansberry* v. *Lee*, 311 U. S. 432, the court annulled a state judgment in a class suit, because the parties thereto had not been afforded "a notice and opportunity to be heard as are requisite to the due process which the constitution prescribes."

Once again the main requirements of due process with respect to notice and hearings are considered in *Powell* v. *Ala.*, 287 U. S. 45, 68:

> "It never has been doubted by this, or any other so far as we know, that notice and hearing are preliminary steps essential to the passing of an enforceable judgment, and that they, together with a legally competent tribunal having jurisdiction of the case, constitute basic elements of the constitutional requirement of due process."

Other cases which have considered the principle are:

Ohio Bell Telephone Company v. *Public Utilities Commission*, 301 U. S. 292, 304.

The case dealt with an administrative tribunal and the lodging of administrative discretion in such an agency. Said the court:

> "All the more insistent is the need, when power has been bestowed so freely, that the '*inexorable safeguard*' (*St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 36, 73) * * * of a fair and open hearing be maintained in its integrity. *Morgan* v. *United States*, 298 U. S. 468, 480, 481, * * * *Interstate Commerce Commission* v. *Louisville & N. R. Co.*, 227 U. S. 88 * * * The right to such a hearing is one of 'the rudiments of fair play'. (*Chicago N. & St. P. R. Co.* v. *Polt*, 232 U. S. 165, 168 * * *) assured to every litigant by the Fourteenth Amendment as a minimal requirement. *West Ohio Gas Co.* v. *Public Utilities Commission* (no. 1), (no. 2), 294 U. S. 63, 79, * * * *Brinkerhoff-Paris Trust & Sav. Co.* v. *Hill*, 281 U. S. 673, 682 * * * *Cf. Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294, 350, *supra*. There can be no compromise on the footing of convenience or *expediency*, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored."

Similarly, in *Railroad Commission of California* v. *Pac. Gas & Elec. Co.*, 302 U. S. 388, 393, we find:

> "The right to a fair and open hearing is one of the rudiments of fair play assured to every litigant by the Federal Constitution as a minimal requirement. *Ohio Bell Tel. Co.* v. *Public Util. Com.*, 301 U. S. 292, 304, 305, * * * There must be due notice and an opportunity to be heard, the procedure must be consistent with the essentials of a fair trial, * * *"

Another administrative agency case is *Morgan* v. *U. S.*, 304 U. S. 1, 14. The court insisted that:

> "* * * the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. These demand 'a fair and open hearing,'—essential alike to the legal validity of the administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental process. Such a hearing has been described as an 'inexorable safeguard.'"

The right of a Japanese to a hearing, as an essential element of Federal due process was upheld in *Wong Wing* v. *U. S.*, 163 U. S. 140, 143, holding that a Japanese alien "* * * shall not be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury, nor be deprived of life, liberty or property without due process of law."

Compare also the most recent case upon the subject, *Skinner* v. *Oklahoma*, 316 U. S. 535, annulling the Oklahoma sterilization law because amongst other things it condemned "without hearing, all the individuals of a class." (Concurring opinion of Chief Justice Stone.)

In the face of the clear mandate of the decisions of this Court requiring some kind of hearing as essential to due process, we now examine the claims asserted to justify failure to accord individual loyalty hearings to American citizens of Japanese ancestry who might have been suspected of disloyalty. The grounds asserted for this failure are that such hearings were impractical, on the one hand; and inadequate to cope with the alleged military danger, on the other hand.

The time-table of evacuation of itself, gives the answer. The attack on Pearl Harbor took place on December 7, 1941; Executive Order #9066 was not signed until February 19, 1942, almost two and a half months later. It was not until July 7, 1942,[1] seven full months after Pearl Harbor, that the army announced that persons of Japanese ancestry had been removed to assembly centers; and the task was not yet finished, for the transfer from assembly centers to Relocation Centers had to be achieved and this was not accomplished until early in November, 1942.[2] Not until March 14, 1943, did General DeWitt dissolve the Board that directed the West Coast evacuation. To argue that during these long months of indecision and debate, hearing boards could not have been efficiently organized is to beg the issue. It is inconceivable that this country which could gather information concerning its total manpower almost at a stroke, which could mobilize a gigantic army in a short time, which could shift from peacetime industrial organization to a war economy with impressive swiftness, could not have gathered the relevant information relating to such a small segment of its population within that period. There were those, of course, who claimed that it would have been impossible to tell the loyal from the disloyal; who said that all persons of Japanese ancestry look alike. It is a challenge to the intelligence of this nation that such childish opinions actually carried the day. Obviously, nothing can be told about the loyalty of people by looking at them, no matter what their appearance. The decision should have been made by people who trusted less to their visual impressions than to concrete information that they would have had before them. In any event, as any biologist knows there is quite as much

1. *Los Angeles Times*, July 8, 1942.
2. *Los Angeles Daily News*, November 6, 1942.

individual variation among persons of Japanese ancestry as there is within any other relative homogeneous population The truth is that it would have been relatively simple to compile information about persons of Japanese ancestry. They are not newcomers to our shores. Since total exclusion of orientals has been in effect since 1924, every adult has been here for approximately 20 years or more. These people have long records of work and residence. Their children have gone to our schools and the record of their conduct and achievement is available.

It is interesting to note that those who opposed hearing boards were the professional anti-orientalists, the politicians, and the downright ignorant. Those who had had frequent contact with persons of Japanese ancestry, clergymen, educators, and thoughtful citizens in every walk of life, were unanimously in favor of hearing boards. The Committee on National Security and Fair Play, headed by General David Barrows, Henry F. Grady, University Presidents Sproul and Wilbur, and Dr. Robert A. Millikan, urged the utilization of boards. These are persons of proved executive ability, who would not propose something unrealistic and impossible. On April 30, 1942, a group of over two hundred distinguished Americans signed a letter addressed to President Roosevelt, in which they voiced the same judgment and sentiment:

> "The immediate and specific purpose of this letter is to urge you to extend to Japanese aliens, and especially to citizens of Japanese origin, on the West Coast, the right to a hearing before civilian boards to attest to their loyalty. This should be done, if possible, before evacuation from their homes and businesses, but also, in cases where they have already been removed, in order to establish the right to return to their homes."

Those who were most familiar with the problem were most convinced that hearing boards were feasible and necessary. For instance, an intelligence officer whose very task was the investigation of persons of Japanese ancestry on the West Coast has written:

> "At each assembly or relocation center, boards for the purpose of review of such cases should be set up. The boards should consist of representatives of the military service, of the Department of Justice, and of the War Relocation Authority. These boards are for the express purpose of deciding on the points of logic and reason and in view of the circumstances in each case, whether or not the individual is to be considered in the class of the potentially dangerous. • • •
>
> "To sum up, the entire 'Japanese Problem' has been magnified out of its true proportion, largely because of the physical characteristics of the people. It should be handled on the basis of the individual, regardless of citizenship and not on a national basis."[3]

The amazing thing is that while hearings have not been arranged for Japanese residents and citizens of Japanese ancestry against whom no charges were made, hearings are being held for enemy aliens arrested upon suspicion of subversive activities or connections. In January, 1942, the Attorney General announced that 92 such alien hearing boards had been established in the federal jurisdictional districts. Of these alien hearing boards, James G. McDonald has written in the New York Times, the civilian hearing boards which have been examining those already apprehended by the Federal Bureau of Investigation have done an excellent piece of work. Their

3. "The Japanese in America," *Harpers Magazine*, October, 1942, pp. 496-497.

record justifies Attorney General Biddle's judgment in calling them into being.[4]

The irrefutable proof that hearing boards were feasible and adequate is found in the English experience. When England went to war, there were more than 74,000 enemy aliens on the Island. In the first weeks of the conflict, they were ordered to register. Immediate investigations of these people were begun. 112 alien tribunals were organized all over the country. Without any difficulty 74,220 cases were examined in six months. The first 64,000 (Class C) were exempted from internment or special restrictions. Only 2,000 were interned.[5] In describing the English experience, Kempner concludes:

> "In this war, as we see, it is more important to inquire into the fundamental spiritual loyalties of a person than the formal facts concerning his national origin and previous residence."

When in the Spring of 1940, Germany unleashed her full power and crushed France, a reaction, born of panic and despair, temporarily engulfed the British Isles. The fear of Fifth Column activities arose and popular pressure for the internment of all aliens was exerted.

As Maximilian Koessler has written:

> "Reluctantly the Government, as a result of pressure from the military set, gave way to this tendency, but it did so gradually."[6]

Interestingly enough all the superficial arguments which were used on the West Coast to facilitate the

4. *New York Times*, April 6, 1942.
5. Robert M. W. Kempner, "The Enemy Alien Problem in the Present War." *American Journal of International Law*, Vol. 34, No. 3, July, 1942, pp. 444-446.
6. Maximilian Koessler, "Enemy Alien Internment, With Special Reference to Great Britain and France. *Political Science Quarterly*, Vol. 57, March, 1942, p. 104.

evacuation of those of Japanese ancestry were used in England at this time against the enemy aliens there. It was charged that Hitler had planted spies and saboteurs in England in the guise of refugees. It was charged that the aliens since they looked and acted and could speak like the potential invaders, would give them unqualified assistance. It was argued that there was no way in which loyalties could be finally ascertained. On June 21, 1940, the date of the fall of France, the liberal policy was reversed and general internment was approved.

But even the fact that the Germans were but 20 miles from England could not keep this policy from being a center of debate. There were those, of course, who argued for the treatment of people in the mass or as members of a class, rather than as individuals. On August 22, 1940, a member of the House of Commons, Mr. Pickthorn, introduced this policy by an argument which is not unfamiliar:

> "If an archangel appeared before all the members of the War Cabinet at once and said, 'There is one red-headed man in England who unless care is taken, will do something to injure the State', I think it would be the duty of the War Cabinet to see that all red-headed men were interned. • • •"[7]

But the Pickthorns of England, unlike their counterparts in this country, did not for long have their way. Our own Attorney General has described what happened:

> "We may well keep the experience of England before us and profit thereby. According to Sir Norman Birkett, at the outbreak of the war there were in that country 74,200 German and Austrian aliens, mostly Jewish refugees. England began by classifying her alien enemies, and interned only 568

7. *Ibid.*, p. 105.

at the start of the war. However, by August of 1940, the customary reserve of the British had given way to panic at the spectacle of what the Fifth Column had done to France and the low countries. The Government yielded to the pressure, and all aliens were thrown into hastily laid out camps.

"Conditions there were bad. Britons themselves deplored the error. Sir John Anderson, then Home Secretary, said the wholesale interment had victimized 'some of the bitterest and most active enemies of the nazi regime.' Said Rhys Davies: 'I am sure the treatment meted out to our alien population in the last few months is not the result of cruel intention but of panic and sheer stupidity.' A letter to the Times, signed by a group of Prominent Londoners, among them H. G. Wells, included the opinion that 'nothing could be more calculated to dishearten our friends and allies in Germany and Austria than the news that Britain had put under lock and key her own anti-Nazis of German and Austrian origin.' Then the reaction set in. The British public, having undergone a few bombing raids, ran true to form. In real danger, the British forgot their fears. Letters began pouring in to the internees at the rate of 120,000 a week. Pressure again was exerted on public officials. Picking and choosing started all over again. Today, in Great Britain, Canada, and Australia combined, the internees total about 15,000."[8]

After English common sense had reasserted itself, Home Secretary Herbert Morrison was able to say, on October 8, 1941:

"There is among us today a degree of national unity as nearly absolute as anything human can be.

8. Francis Biddle, "The Problem of Alien Enemies," *Free World*, August 1942, Vol. III, No. 3, pp. 201-4.

> There may be a tiny minority with special views, but it is not one percent. I have let go most of our small band of Fascists and Mosleyites because they are no longer potential dangers to the country. We have only 697 British subjects interned, and of these 317 are of enemy origin. Of scores of thousands of aliens, only 9,700 are still detained. A democracy confident of its cause and of itself does not need to use a big stick at home."[9]

There have been constant calls from informed persons in the United States for our authorities to utilize the English experience. So long ago as April 6, 1942, McDonald wrote in his New York Times article:

> "With the evidence of England's experience before us we should not be reluctant to reach the same conclusions about aliens resident in this country. If, as the President, our Federal agencies, and those who have intimate knowledge of our alien population believe, and as the experience of the last war demonstrated, we shall eventually be convinced that the great majority of our alien population is loyal, it is but good judgment and statesmanship to reach this decision at the earliest possible moment. Civilian hearing boards are the obvious answer. They should be set up immediately."[10]

It is to be noted, moreover, that despite the recurrent danger of imminent invasion, England at no time resorted to the method of discrimination, wholesale evacuation or internment of its citizens of German or any other ancestry.

Unfortunately, most of our own officials have been woefully lax and uninformed in relation to the entire problem. On March 6, 1942, Dr. Felix Guggenheim, who

9. Alan Cranston, "Enemy Aliens," *Common Ground*, Winter, 1942, p. 111.
10. McDonald, James G., *New York Times*, April 6, 1942.

had been in England when the war broke out described the details of the English experience for the Tolan Committee.[11] It is obvious from their comments that the members of the Tolan Committee were hearing about the subject for the first time. Later in the day Mr. Tom C. Clark, Chief of the Civilian Staff of General John L. DeWitt, appeared before the Tolan Committee. Mr. Clark of all people should have been entirely conversant with the history of the English situation. Instead, when the committee members mentioned that they had heard testimony concerning England's identical problem and asked Mr. Clark whether he was "familiar with England's experience on that", Mr. Clark answered "No".[12] This evidences then that delay and uncertainty ruled at the time that hearing boards should have been in operation. Thoughtful and able citizens who had concrete plans for hearing boards were ignored. Parallel situations in other countries, particularly in England were likewise ignored. It was left to Imperial England to demonstrate how Democratic America should have solved this internal problem.

Conclusion

We are at war. We are fighting for our lives—as well as our rights.

And yet we must bear in mind that war does not suspend the Constitution, nor dissolve the Bill of Rights.

Chief Justice Hughes, who has emphasized the importance of preserving the war power on numerous occasions, summarized our position in *Home Building and Loan Association* v. *Blaisdell*, 290 U. S. 390, 426:

11. *Tolan Committee Hearings*, Part 31, pp. 11733-11737.
12. *Tolan Committee Hearings*, Part 31, p. 11784.

> "* * * war power is the power to wage war successfully, and thus it permits the harnessing of the entire energies of the people in a supreme cooperative effort to preserve the Nation. *But even the war power does not remove constitutional limitations safeguarding essential liberties.*" (Italics ours.)

Similarly, Justice Brandies recognized the paramount authority of the Constitution, in war times equally as in peace, in *Hamilton* v. *Kentucky Distilleries*, 251 U. S. 146:

> "The war power of the United States, like its other powers and like the police power of the States, is subject to applicable constitutional limitations."

And in *Sterling* v. *Constantin*, 287 U. S. 378, a unanimous Supreme Court pointed out that even as to the military authorities both in war and in peace there is "no avenue of escape from the paramount authority of the Federal Constitution."

We, of course, make no claim for "absolute" constitutional rights; we appreciate that during war many of the liberties of the people must yield to imperative and immediate military necessity; and that such abridgment of rights do not offend constitutional guarantees if their denial is "*directly related*" to such military need.

When a nation is fighting for world freedom over far-flung battle grounds around the globe, however, it is vital that those freedoms be preserved at home, except only where clear military necessity, in each particular case, may make abridgment imperative.

"The country must be preserved, but in a way that is worth preserving." *Ex parte Milligan*, 4 Wall. 2, 126.

The judgment below should be reversed.

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION,
Amicus Curiae.

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SUPREME COURT, U. S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1942

No. 870

GORDON KIYOSHI HIRABAYASHI,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR NORTHERN CALIFORNIA BRANCH OF THE AMERICAN CIVIL LIBERTIES UNION, AMICUS CURIAE.

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(The various proclamations and a number of the civilian exclusion orders referred to this brief are set forth in sequence at pages 293 to 351 of the Appendix of House Report No. 2124 of Select Committee Investigating National Defense Migration, May 1942, commonly known as the Tolan Committee Report.)

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1942

No. 870

GORDON KIYOSHI HIRABAYASHI,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR NORTHERN CALIFORNIA BRANCH OF THE AMERICAN CIVIL LIBERTIES UNION, AMICUS CURIAE.

STATEMENT OF THE CASE.

This is an appeal prosecuted by the appellant from a judgment of conviction followed by a sentence to imprisonment rendered and entered against him in the United States District Court for the Western District of Washington, Northern Division, on October 21, 1942, in a criminal case arising out of an indictment charging him with the commission of two misdemeanors under Public Law No. 503. (18 U.S.C.A. 97a.) The case comes before this Court

upon a Certificate of Questions of Law upon which the Ninth Circuit Court of Appeals desires instruction for the proper disposition of the cause.

The appellant is a native-born American citizen of Japanese ancestry. He was born in Seattle, King County, Washington, on April 23, 1918, and at the time of his conviction in the District Court was 24 years of age and a student attending the University of Washington. On May 28, 1942, the said indictment was filed against him, the first count thereof charging him with a violation of the curfew regulation imposed upon him as an American citizen of Japanese ancestry by Public Proclamation No. 3 issued by General DeWitt on March 24, 1942, and the second count thereof charging him with a violation of the military evacuation provision of Civilian Exclusion Order No. 57 issued by General DeWitt on May 10, 1942, which commanded appellant as an American citizen of Japanese ancestry to submit to evacuation by the Army from his home in Seattle and destined him for internment by reason of his Japanese ancestry. The said proclamation and exclusion order were applied to appellant as an American citizen of Japanese ancestry to the exclusion of American citizens of other racial stock residing in the same area. The constitutional questions involved in this appeal were raised and urged in the District Court and the Ninth Circuit Court of Appeals in the proceedings below.

STATUTE, PROCLAMATIONS AND EXECUTIVE ORDERS, THE VALIDITY OF WHICH IS INVOLVED.

(1) *Public Law No. 503,* 77th Congress, 2nd Session, Chap. 191, H. R. 6758, approved March 21, 1942 (see Title 18, U. S. Code, sec. 97a), the validity of which is involved herein, reads as follows:

> "Whoever shall enter, remain in, leave, or commit any act in any military area or military zone which has been prescribed, under the authority of an Executive order of the President, by the Secretary of War, or by any military commander designated by the Secretary of War, contrary to the restrictions applicable to any such area or zone or contrary to the order of the Secretary of War or any such military commander, shall, if it appears that he knew or should have known of the existence and extent of the restrictions or order and that his act was in violation thereof, be guilty of a misdemeanor and upon conviction shall be liable to a fine of not to exceed $5,000 or to imprisonment for not more than one year, or both, for each offense.

(2) *Executive Order No. 9066,* the validity of which is involved herein, was promulgated by the President under date of February 19, 1942. It appears in the *Federal Register* of February 25, 1942, in Vol. 7, No. 38, page 1407. It reads as follows:

> "Whereas the successful prosecution of the war requires every possible protection against espionage and against sabotage to national defense material, national defense premises, and national defense utilities as defined in Section 4, Act of April 20, 1918, 40 Stat. 533, as amended by the Act of November 30, 1940, 54 Stat. 1220, and the

Act of August 21, 1941, 55 Stat. 655 (U.S.C., Title 50, Sec. 104):

Now, therefore, by virtue of the authority vested in me as President of the United States, and Commander in Chief of the Army and Navy, I hereby authorize and direct the Secretary of War, and the Military Commanders who he may from time to time designate, whenever he or any designated Commander deems such action necessary or desirable, to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion. The Secretary of War is hereby authorized to provide for residents of any such area who are excluded therefrom, such transportation, food, shelter, and other accommodations as may be necessary, in the judgment of the Secretary of War or the said Military Commander, and until other arrangements are made, to accomplish the purpose of this order. The designation of military areas in any region or locality shall supersede designations of prohibited and restricted areas by the Attorney General under the Proclamations of December 7, and 8, 1941, and shall supersede the responsibility and authority of the Attorney General under the said Proclamations in respect of such prohibited and restrictive areas.

I hereby further authorize and direct the Secretary of War and the said Military Commanders

to take such other steps as he or the appropriate Military Commander may deem advisable to enforce compliance with the restrictions applicable to each Military area hereinabove authorized to be designated, including the use of Federal troops and other Federal Agencies, with authority to accept assistance of state and local agencies.

I hereby further authorize and direct all Executive Departments, independent establishments and other Federal Agencies, to assist the Secretary of War or the said Military Commanders in carrying out this Executive Order, including the furnishing of medical aid, hospitalization, food, clothing, transportation, use of land, shelter, and other supplies, equipment, utilities, facilities, and services.

This order shall not be construed as modifying or limiting in any way the authority heretofore granted under Executive Order No. 8972, dated December 12, 1941, nor shall it be construed as limiting or modifying the duty and responsibility of the Federal Bureau of Investigation, with respect to the investigation of alleged acts of sabotage or the duty and responsibility of the Attorney General and the Department of Justice under the Proclamations of December 7 and 8, 1941, prescribing regulations for the conduct and control of alien enemies, except as such duty and responsibility is superseded by the designation of military areas hereunder."

The continental United States is divided for military convenience into seven military districts, de-

partments or commands. One of these is designated the "Western Defense Command" which is under the command of J. L. DeWitt, Lieutenant-General, U. S. Army. It embraces the entire States of Washington, Oregon, California, Montana, Idaho, Nevada, Utah and Arizona and the Territory of Alaska. The public proclamations and civilian exclusion orders hereinafter discussed were issued by said General DeWitt and appear in Volume 7 of the Federal Register.

(3) *Public Proclamation No. 1,* the validity of which is involved herein, was promulgated March 2, 1942. It establishes two military areas. These are "Military Area No. 1", which embraces the western halves of Washington, Oregon and California and the southern half of Arizona, and "Military Area No. 2", which embraces the eastern halves of Washington, Oregon and California and the northern half of Arizona. (See 7 F. R. 2320.)

(4) *Public Proclamation No. 2,* the validity of which is also involved herein, was promulgated March 16, 1942, and establishes four additional military areas which are designated *"Military Areas Nos. 3, 4, 5 and 6",* respectively, and embrace the entire States of Idaho, Montana, Nevada and Utah. (See 7 F. R. 2405.)

These foregoing two zoning proclamations required alien enemies and persons of Japanese ancestry residing in the said Military Areas to report any change in their places of residence.

(5) *Public Proclamation No. 3,* promulgated March 24, 1942, imposed "curfew" regulations upon

these people, prohibited them from traveling beyond a distance of five miles from their residences and compelled the confiscation of certain articles of personal property they possessed, including weapons, radios, cameras and signal devices. (See 7 F. R. 2543.)

(6) *Public Proclamation No. 4,* promulgated March 27, 1942, prohibited all alien and non-alien Japanese within the limits of Military Area No. 1 from leaving the said military area. (See 7 F. R. 2601.)

(7) *Civilian Exclusion Order No. 57,* the validity of which is involved herein, was promulgated by said General DeWitt on May 10, 1942. It appears in 7 Federal Register at page 3725. It reads as follows:

> "1. Pursuant to the provisions of Public Proclamations Nos. 1 and 2, this Headquarters, dated March 2, 1942, and March 16, 1942, respectively, it is hereby ordered that from and after 12 o'clock noon, P.W.T., of Saturday, May 16, 1942, all persons of Japanese ancestry, both alien and nonalien, be excluded from that portion of Military Area No. 1 described as follows:
>
> (The particular description of the area in the County of King, State of Washington, is omitted for the sake of brevity.)
>
> 2. A responsible member of each family, and each individual living alone, in the above described area will report between the hours of 8:00 A.M. and 5:00 P.M., Monday, May 11, 1942, to the Civil Control Station located at: Christian Youth Center, 2203 East Madison Street, Seattle, Washington.

3. Any person subject to this order who fails to comply with any of its provisions or with the provisions of published instructions pertaining hereto or who is found in the above area after 12 o'clock noon, P.W.T., of Saturday, May 16, 1942, will be liable to the criminal penalties provided by Public Law No. 503, 77th Congress, approved March 21, 1942, entitled "An Act To Provide a Penalty for Violations Or Orders With Respect to Persons Entering, Remaining in, Leaving or Committing any Act in Military Areas or Zones," and alien Japanese will be subject to immediate apprehension and internment.

4. All persons within the bounds of an established Assembly Center pursuant to instructions from this Headquarters are excepted from the provisions of this order while those persons are in such Assembly Center."

QUESTIONS INVOLVED.

The questions involved herein are as follows:

1. Can the appellant be punished under Public Law No. 503 for the exercise of his constitutional rights of national citizenship?

2. Is the statute void for uncertainty in failing to prescribe definite military areas and specific restrictions on the activities of all citizens alike therein?

3. Is the statute void for containing an unconstitutional delegation of legislative power to Courts and juries to determine what acts shall be criminal and punishable?

4. Can Congress ratify executive orders which are not *in esse* but which may or may not be prescribed *in futuro* by executive officials or military officers and which, when legislated by them, deprive the appellant of his constitutional rights and liberties?

5. Can the appellant as an American citizen engaged in civilian pursuits simply because he is descended from ancestors who were nationals of Japan be excluded from a military area of a comprehensive States-embracing extent prescribed by military officers but not by Congress and be punished under the statute for remaining therein when a like exclusion is not imposed by the military officers upon citizens therein of other racial stock?

6. Can the constitutional rights of the appellant as an American citizen be curtailed or destroyed at the whim and caprice of a military commander within the continental limits of the United States and outside a theater of war in the absence of martial rule and without a declaration of martial law by Congress?

7. Does the existence of a state of war or of national emergency in itself deprive Congress of legislative power and the judiciary of judicial power and concentrate these powers in the hands of executive or military officers and enable them, through the medium of executive fiats and discriminatory exclusion orders, to make the exercise of the rights of national and state citizenship by the appellant dependent upon his ancestry?

8. As the enforcement machinery of military exclusion orders which discriminate against and intern the citizen appellant and a whole segment of our citizenry simply because they are descendants of ancestors who once were Japanese nationals is not the statute, on its face and as applied to appellant, unconstitutional and void as depriving him of his liberty and of his property without *due process of law* and as denying him the *equal protection of the law* guaranteed to him by the Fifth Amendment, as constituting an *infamous punishment* forbidden by the Fifth Amendment, as abridging the fundamental *privileges and immunities* of national and state citizenship guaranteed to him by the Fifth and Fourteenth Amendments and Art. IV, Sec. 2, cl. 1 of the Constitution and as constituting a *bill of attainder* forbidden by Art. I, Sec. 9, cl. 34 of the Constitution?

9. As the enforcement procedure for illegal military orders which discriminate against the citizen appellant simply because of his Japanese ancestry and which subject him to unreasonable search, seizure and internment in a military concentration camp by the federal troops without accusation of crime and without affording him a judicial trial or administrative hearing is the statute not void as in derogation of the provisions of the Fourth and Sixth Amendments?

10. Is not the statute void as giving effect to military orders which, for no reason other than that he is of Japanese ancestry, banish and impose upon appellant a condition of slavery and involuntary servitude forbidden by the Thirteenth Amendment and

which also inflict upon him an infamous and cruel and unusual punishment in violation of the Fifth and Eighth Amendments?

11. In providing for an excessive fine and penalty upon appellant in the absence of criminal action and intention upon his part is the statute not void as repugnant to the provisions of the Eighth Amendment?

ARGUMENT.

It is probable that a case of more public importance than this has never been presented to a United States Court. It involves human liberty. Upon the final determination of its issues directly depends the rights of approximately 73,000 American citizens of Japanese ancestry and indirectly the rights of each and every citizen of the United States. If inviolable rights are not an illusion but a reality and inhere in national citizenship and are of significance they are to be preserved or lost herein.

OUTLINE OF EVENTS GIVING RISE TO ISSUES INVOLVED HEREIN.

Measures taken under the Alien Enemy Act.

On Sunday, December 7, 1941, we were attacked at Pearl Harbor and Honolulu on the Island of Oahu in the Territory of Hawaii by enemy forces of Japan. After the attack the Imperial Japanese Government formally declared war on the United States and Great Britain. Promptly, on the same day, the President

invoked the *Alien Enemy Act* in *Public Proclamation No. 2525** which enjoined Japanese nationals within our jurisdiction to preserve the peace and to obey regulations to be promulgated by him. This proclamation also authorized the Attorney General to enforce presidential proclamations on the mainland and the Secretary of War on our outlying possessions. It also prohibited these aliens from having possession of firearms, ammunition, signal devices, cameras and other articles of personalty. On Monday, December 8, 1941, Congress formally declared war on Japan and the President invoked identical prohibitions against German nationals in *Public Proclamation No. 2526* and against Italian nationals in *Public Proclamation No. 2527*. On Thursday, December 11, 1941, Germany and Italy declared war on the United States and Congress thereupon formally declared war against them.

During the remainder of the month of December there was an absence of clamor against the Japanese aliens resident on the Pacific Coast and the native-born Americans of Japanese descent. During January of 1942 an artificial clamor of a somewhat sporadic nature in its inception was initiated against them by sources long hostile to Orientals in general. These sources endeavored to inflame public opinion against them through the medium of petitions, the press and radio broadcasts. They increased the intensity of their

*The various proclamations and a number of the civilian exclusion orders referred to in the above outline are set forth in sequence at pages 293 to 351 of the Appendix of House Report No. 2124 of Select Committee Investigating National Defense Migration, May 1942, commonly known as the Tolan Committee Report.

propaganda in the hope the public might be gullible enough to pick up the hue and cry and thereby serve the special interests of these agitators. A few notorious public officials declaimed against them. A few city councils and boards of supervisors in rural areas passed illegal restrictive measures against these residents and petitioned Congress to enact legislation against them. They sought to invoke the spirit of vigilantism, long a curse of the Western States, for their own personal economic or political gain. The public which they sought to cast in a lawless role was not misled by the rising flood of propaganda and, consequently, greeted the avalanche of abuse and invective with calmness and exhibited no inclination to molest or harm these people. H. R. 2124, pp. 149-150.

On January 14, 1942, the President, by *Public Proclamation No. 2537* issued under the authority of the Alien Enemy Act, required all alien enemies, Japanese, German and Italian, to acquire certificates of identification. On January 29th the Attorney General, under authority delegated to him by the President, prohibited all alien enemies from certain areas on the Pacific Coast and extended these areas by subsequent proclamations on February 2nd, 4th and 7th. The areas from which these proclamations prohibited these alien enemies surrounded *national defense material, premises and premises* defined in Title 50 USCA, Section 104, a statute entitled *"Willful Destruction of War or National Defense Material"*, a violation of which is a felony punishable by 30 years imprisonment and $10,000.00 fine under 50 USCA 101. The

purpose of setting up these prohibited zones was asserted to be an attempt to prevent acts of espionage and sabotage to such material, premises and utilities.

On February 4, 1942, the Attorney General announced that an area extending from 50 to 150 miles inland from the Pacific coastline had been declared a "restrictive area" for all alien enemies. On the same date he set up *curfew* regulations and *travel* restrictions on all alien enemies living within the prohibited areas. All of these restrictive measures taken by the President and the Attorney General were imposed and enforced under the authority conferred by the *Alien Enemy Act,* Title 50 USCA, Sections 21-24, upon the executive. They applied only to alien enemies of the *"age of 14 years and upward"* as authorized by the Act and were neither applicable to nor applied to any American citizen. It is to be noted that executive action taken under this Act in time of war against alien enemies is valid and not reviewable by our Courts. Like action taken against a citizen, however, is unlawful and is reviewable and redressable by our Courts. See *Ex parte Franklin,* 253 Fed. 984; *Ex parte Risse* and *Stallforth,* 257 Fed. 102, and *Ex parte Gilroy,* 257 Fed. 110, deciding that habeas corpus lies to release a *citizen* detained under a presidential warrant issued under the Alien Enemy Act.

On February 13, 1942, a delegation of west coast congressmen, influenced by the rising tide of propaganda directed against alien enemies generally, sent a letter to the President suggesting that it might be desirable for the Army or the Department of Justice

to remove from "all strategic areas" persons whose presence was inimical to national defense. Its recommendation was not directed to an indiscriminate mass removal of a segment of our citizenry on a race origin basis. Although Executive Order No. 9066 thereafter issued by the President somewhat paralleled this recommendation there is no evidence that he acted thereon. In early February the Tolan Committee, the House of Representative's Select Committee Investigating National Defense Migration, was authorized to open public hearings touching upon the question of evacuating persons and made arrangements to open its hearings in San Francisco and Los Angeles on February 21st.

Measures taken under extra-constitutional powers.

From here on we become concerned with military orders which interfere with the constitutional rights and liberties of American citizens of Japanese ancestry and which are not referable to and do not derive authority from the Alien Enemy Act or any other law known to American jurisprudence. These peculiar and unprecedented orders follow the pattern of the prior orders of the President and the Attorney General restricting alien enemies but expand their scope and are made applicable to alien enemies and to American citizens of Japanese ancestry. The military exclusion orders which were to issue were finally applied only to Japanese aliens and to American citizens of Japanese ancestry. German and Italian alien enemies and their citizen progeny were unaffected thereby.

On February 19, 1942, *Executive Order No. 9066* was issued by the President. It authorized the Secretary of War and any military commanders he or the Secretary of War might designate *"to prescribe military areas in such places and of such extent as he or the appropriate military commander may determine, from which any and all persons may be excluded* * * *" and to use executive agencies to transport and give accommodation to the persons removed.

On February 21, 1942, the Tolan Committee assembled in San Francisco and opened the first of the congressional hearings. Whether these hearings were to determine the desirability of evacuating alien enemies generally from areas to be defined or to determine the necessity of a general evacuation of the civilian public from areas of danger does not appear from its reports. Most of the testimony was devoted to the question of removing alien enemies and a part to that of removing citizens of Japanese descent. Before the first report of this committee, *H. R.* 1911, ordered printed on March 15, 1942, was off the press and available for distribution Public Proclamations 1, 2 and 3 and the first group of civilian exclusion orders had been issued and the mass removal of Japanese aliens and citizens of Japanese ancestry was under way. As this mass evacuation proceeded apace hundreds of human jackals who viewed the proceedings with avaricious eyes, all of whom fall within the classification of whites, descended in packs to acquire the properties of these unfortunate evacuees at sacrifice prices. *H. R.* 2124, p. 173 et seq. General DeWitt

personally took what steps he could to mitigate property loss to the evacuees but the losses suffered by these people were enormous before the government devised means to stop the plunder and to protect the remainder.

On March 2, 1942, General DeWitt issued *Public Proclamation No. 1* which set up military areas ostensibly under authority conferred by Executive Order No. 9066. It prescribed Military Area No. 1 which embraces the western halves of Washington, Oregon, California and the southern half of Arizona, and Military Area No. 2 embracing the remaining halves of these states. This proclamation required all alien enemies of Japan, Germany and Italy, and all American citizens of Japanese ancestry within said areas to report "any changes in their place of residence". H. R. 2124, p. 317. The right to divide the country into areas, districts or departments for military convenience is not challenged herein but the right of the military authorities to interfere with the activities and liberties of citizens within such areas and the right to substitute military government and to apply military law therein over civilians is challenged.

On March 9, 1942, the War Department, by letter addressed to the Military Affairs Committee sought the passage of a statute, a penal statute, to make punishable any refusal of persons to remove themselves from forbidden military areas set up or to be set up by the military authorities. See U. S. Code, Cong. Ser. No. 3, page 281.

On March 16, 1942, General DeWitt issued *Public Proclamation No. 2* which set up four additional military departments for military convenience, namely, Military Areas Nos. 3, 4, 5 and 6 which embrace the entire States of Idaho, Montana, Nevada and Utah. It sets up in these States "A" Zones from which all alien enemies and citizens of Japanese ancestry are excluded. It also required these people "to report any changes in their place of residence". H. R. 2124, page 321. On March 18, 1942, the President issued *Executive Order No. 9106* which set up the "War Relocation Authority" to provide for the relocation "of persons or classes of persons" who might be moved from military areas. H. R. 2124, p. 315.

On March 18, 1942, *Public Law No. 503,* now codified as 18 *USCA* 97a, was approved and became effective. It makes it a misdemeanor for any person to remain in a military area forbidden to him as prescribed by a military commander.

On March 24, 1942, General DeWitt issued *Public Proclamation No. 3* (H. R. 2124, p. 320) which imposed *curfew* regulations and *travel* restrictions upon all alien enemies and citizens of Japanese ancestry in Military Area No. 1 and the "A" and "B" Zones in Military Areas Nos. 2, 3, 4, 5 and 6. This proclamation also prohibited these people from having possession of arms, munitions, weapons, cameras, signal devices, radios and other articles of personal property and threatens them with prosecution under Public Law No. 503 for a violation of its provisions. The appellant was convicted in the Court below of viola-

tions of the curfew regulations of this proclamation. On the same date the first of the civilian exclusion orders was issued. See 7 F. R. 2581.

On March 29, 1942, *Public Proclamation No. 4* was issued by General DeWitt prohibiting all Japanese aliens and citizens of Japanese ancestry from leaving Military Area No. 1 in Washington, Oregon, California and Arizona. This is sometimes referred to as the "freezing" order. *H. R.* 2124, p. 331. Thereafter, on March 30, 1943, *Public Proclamation No. 5* was issued by General DeWitt allowing certain German and Italian aliens to claim exemption from exclusion from Military Areas 2, 3, 4, 5 and 6. H. R. 2124, p. 331. No like exemptions were ever granted to Japanese nationals or to American citizens of Japanese ancestry.

On May 10, 1942, *Civilian Exclusion Order No. 57* was issued by General DeWitt. It is a blanket exclusion order providing for the exclusion of the appellant and other citizens of Japanese ancestry from their homes in Seattle and for their evacuation therefrom by the Army and temporary detention at a Civil Control. This order destined them for imprisonment in a concentration camp. The appellant was also convicted under Public Law No. 503 for a violation of this order. This order threatens "any person subject to it" will be prosecuted under Public Law No. 503 and that "alien Japanese" who violate it will be subject "to immediate apprehension and internment". It is significant that all citizens of Japanese descent who violate the provisions of any of these drastic

exclusion orders have been *interned* as though they were alien enemies. The few who were arrested for a violation thereof and who are not now languishing in prison but were either released, sentenced to probation or have served their prison sentences were thereupon cast into involuntary internment as though they were alien enemies or prisoners of war. The difference in treatment accorded citizens and aliens is merely one of the situs of the internment camps.

Under civilian exclusion orders issued by the command of General DeWitt approximately 70,000 American citizens of Japanese ancestry and 40,000 aliens have been exiled, banished and interned in concentration camps called Relocation Centers. These citizens have not been interned under authority of the Alien Enemy Act which has no application whatsoever to citizens. The orders do not invoke the Alien Enemy Act. They recite as their authority Executive Order No. 9066 issued by the President which asserts its own authority on extra-constitutional grounds, declaring its purpose was the taking of "every possible protection against espionage and against sabotage to national defense material, national defense premises, and national defense utilities as defined in Title 50, U. S. Code, section 104", the act entitled "Willful Destruction of War or National Defense Material". *If any person, citizen or alien, violated the provisions of Title 50, U.S. Code, section 104, he ought to have been charged with a violation thereof and have been tried by our civil authorities and, if convicted, been punished as provided by the terms of section 101, namely,*

by imprisonment for 30 years and a $10,000 fine. Such a person would not have been tried for a mere misdemeanor. It is obvious that Public Law No. 503 was not intended as a substitute for Secs. 101 and 104 of Title 50 of the U. S. Code.

On October 29, 1942, the restrictive measures imposed upon Italian aliens were lifted and in December 24, 1942, General DeWitt lifted the curfew restrictions on German aliens. A like program has not yet been made applicable to Japanese aliens and citizens of Japanese ancestry. If lifted as to German and Italian aliens why has it not been lifted as to *American citizens* of Japanese ancestry in military area No. 2 and why have not these citizens been released and restored to their homes? The reason for this absurd discrimination cannot have originated with the Army but must have its origin in other sources and in all likelihood in the minds of those politicians who victimized these people and dictated this policy to the Army. Surely we have less to fear from these citizens and aliens whose facial characteristics superficially distinguish them from their white brothers and sisters than from the white alien enemies and their citizen sympathizers who commingle a bit more readily in the American scene and are accepted, with class reservations, as social and legal equals. We ought to feel a measure of alarm at the presence of white citizens whose sympathies are with our enemies. We can distinguish the Japanese in our midst but only God can single out the "white" followers of Hitler and Mussolini whether they be aliens or citizens sym-

pathetic with the psuedo-philosophies and imbued with the foreign ideologies and pernicious doctrines of these enemies of America. Yes, we have less to fear from the Japanese aliens here whose faces betray their origin than from German and Italian aliens whose faces conceal their origin and real nationality. We have far more to fear from hostile Axis nationals in this country and those American citizens who are their dupes and tools but whose faces classify them as so-called white men and at the same time conceal their enmity to us. If it is a hunt we must have let it be for these enemies but not a witch-hunt against innocent citizens of Japanese ancestry.

THE PERSONS AFFECTED BY STATUTE AND ORDERS.

The total number of Japanese residents, foreign and native born, on the mainland of the United States, according to the 1940 census takers, was 126,947. Of this number 62.7 per cent or 79,642, are native born Americans. See *Bureau of Census,* U. S. Dept. of Commerce, also *House Report* No. 2124, pages 91 and 94. In the eight states which make up the military district of the Western Defense Command there was to be found, prior to the general evacuation conducted by the Army, a total of 117,364, of which approximately 73,673 are native born Americans of the second, third and fourth generations.

About one-fifth of the total number of Japanese aliens have resided here for a period in excess of

thirty years. Two-thirds of their number entered the United States prior to 1924. Their birth rate is on the decline. The trend is towards urbanization inasmuch as fifty-five per cent reside in cities and forty-five per cent on farms. See *H. R.* 2124, pp. 91-93.

The native born generally have an acquaintance with colloquial Japanese but a reading and writing knowledge of Japanese is beyond the ken of the vast majority. The Kan-ji, ancient imported Chinese ideographs used in writing Japanese, offer too great a barrier to these Americans who, quite naturally, prefer the English language for expression and information.

Whether citizens or aliens, they seldom appear in our criminal and civil Courts. They are not litigious. Their criminal element is negligible and probably lower than that of any of our ethnic groups. If they possess any distinguishing characteristics these may well be said to be docility and obedience to the law. Not fewer than 5000 of these native born were serving in our military forces when this war broke out and this creditable ratio of youths eligible for such service to their ethnic group was not then bettered by any other ethnic group in our midst. Several thousand boys of Japanese descent served in our armed forces during the first World War. The military orders herein, however, constitute an amazing method of signifying governmental appreciation and paying a debt of honor for the contribution they made to our victorious arms.

Whether aliens or citizens this government, through the medium of the military orders and this enforcement statute, has enabled these people to be swindled of their homes, farms, businesses and possessions by avaricious citizens and denizens and has offered them neither compensation for their property losses nor surcease from their misery. See *H. R.* 2124, p. 173 et seq. It has stripped them of their rights and liberties and ruined their lives. It has converted them into pariahs—the untouchables of America. It holds out to them neither hope of relief from their poverty nor expectation for the future.

Their loyalty to America is undeniable.

The loyalty of these aliens and citizens to America does not seem to be in doubt. From their ranks not one authenticated case of treason, espionage or sabotage arose in Hawaii despite the vicious rumors, faked reports and outright lies to the contrary. See *H. R.* 2124, pp. 48 to 59.) Not one of these deported citizens had filed against him in any federal Court of the Ninth Circuit an indictment or information charging any such act. See *Opinion* of Denman, Circuit Judge, dissenting to omission of facts in certificate of questions of law herein. It would be foolish for anyone to charge that an intelligent Japanese who resided here for any period of time voluntarily would trade American for Japanese sovereignty. The privileges enjoyed under a republican democracy in contrast with those under a Japanese monarchy with its semi-feudal appendages holds an immeasurably greater

appeal for these residents and their children than anyone else.

The dual citizenship myth.

The dual citizenship sometimes charged to these citizens of Japanese stock is a vicious charge arising either from prejudice or ignorance. It is easy to attach a brand to another person one does not have to bear himself. Many of those who entertain this puerile suspicion are those hyphenated-Americans whose spiritual home is in Europe and who ought, in good conscience, take up residence there. Each citizen, regardless of his ancestry, who prefers allegiance to a foreign power ought to be permitted to seek the land of his choice. Others who attach this unfair label to these unfortunates are pseudo-patriots who prove their own peculiar brand of patriotism by accusing others of a want of patriotism without an iota of evidence to support their accusations. A few of those who bear neither prejudice nor malice against these people are guilty of repeating this familiar falsehood. However, a majority of our people neither charge them with a dual allegiance nor entertain a belief that these native-born are any more or any less loyal to the United States than American citizens generally.

The Japanese aliens who maintain permanent residence here came here for lawful purposes. They came here, just as our Pilgrim fathers came here, to escape a political, economic and social status that deprived them of dignity and nearly everything of value. They were hopeful of better opportunities than they had

enjoyed and were expectant of fair treatment. Each came for the precise reasons, in the words of Justice Black in *Ex parte Kumezo Kawato* (Nov. 9, 1942), 87 L. Ed. 94, 95, which

> "prompted millions of others to seek our shores —a chance to make his home and work in a free country, governed by just laws, which promise equal protection to all who abide by them."

They were so grateful to America for the refuge it gave and the opportunities it offered that they remained here of their own free choice and although they are not citizens because of our stringent naturalization laws they are every whit as much American as any citizen. The children of these aliens have become American citizens by reason of the fact of their birth in this country just as have all those of white origin born here, including those who would bring this unfair charge of dual allegiance against them. Those of white origin born here derive their citizenship from the *14th Amendment* but a few of them seem to believe they derive it merely from belonging to a so-called white race.

The unjust charge that American citizens of Japanese extraction have a dual allegiance is pure fiction. No sensible person who has visited Japan or who is familiar with Japanese government, customs and traditions would accuse these native born of dual allegiance or accuse them or the Japanese aliens here with being desirous of maintaining subversive links with the land of their ancestors. The aliens came here to escape from their homeland because of the low

status they occupied there. Their native-born children are part of America and the product of our institutions and traditions. These children have no love for the land, government and customs of the country that was unkind to their ancestors.

Since 1924 the Japanese nationality law has provided that the only way an American born Japanese can obtain Japanese citizenship is by being registered at birth with a Japanese consular official. See *H. R.* 2124, note 80, p. 85. Very few of our native born, if any, have been so registered and even if any have been it would not render them disloyal to America, the land of their birth. Does any American citizen care whether the country of his own ancestors might look upon him as a subject?

The American citizens of Japanese descent who were visiting Japan besieged the steamship offices for passage home just before the war storm broke. Those who were unsuccessful in gaining passage in time were gathered up by the Japanese government and were interned for the duration of the war. Radio reports from Tokyo received in the United States shortly after the Pearl Harbor attack announced their internment. The Japanese government interned them to prevent them from indoctrinating the Japanese people with American democratic principles and ideals and from proving themselves a real source of trouble to our eastern enemy. It is quite evident the Japanese government does not view American born citizens of Japanese ancestry as possessing an allegiance to Japan. The dual allegiance charge against these

native-born American citizens that is so lightly bandied about by gullible persons is an utterly false product of suspicion engendered by ignorance. Those who entertain the opinion that these native-born citizens owe a dual allegiance, one to America and one to Japan, are as ignorant as those who believe all Americans owe allegiance to their ancestral lands across the seas. A similar absurd opinion is held by a few biased persons who, unable to differentiate between spiritual and temporal matters, believe all Catholics are subversive because they possess a dual allegiance, one to America and one to the Romish Pope. It is the old barbarian undercurrent in American life, fostered and nursed in ignorance, that pits Protestant against Catholic, Gentile against Jew, the white against the dark skinned and sporadically gives rise to bias, hate, the lynch spirit, mob-violence and all the paraphernalia of pitiless brutality. Always the strong pick upon the weak—convinced the display of cowardice is a show of courage.

The assimilation rumor.

The appellee has asserted, but with some hesitancy and misgiving, that neither the alien Japanese nor our native-born citizens of Japanese ancestry have been or can be assimilated in America. The assertion is but the repetition of a rumor long circulated by the proponents of a white America. Thousands of our alien Japanese and native-born citizens of Japanese extraction fought in the first World War and are fighting in this one to preserve the American way of life for us all. They have served us well in war and in peace.

They live among us, associate with us and fight in our common cause yet appellee asserts they are not assimilated and, consequently, must be treated as they are being treated, like cattle.

A similar statement was current during the first World War when it was argued, without a scintilla of proof, that Germans, Austrians and Hungarians were not absorbed into the life and traditions of America. Persons of Teutonic and Middle European stock in this country then and now number many millions. Hundreds of thousands of them then served and now serve in our armed forces fighting for our democratic principles and ideals. They have served us well in war and in peace.

Similar reasons have been advanced in the case of American negroes. It is, nevertheless, a fact of common knowledge that millions of our inhabitants today are of a mixed white and black stock of varying coloration. It is likewise a well known anthropological fact that each year thousands of American negroes whose skin is light discover they can "pass" and, consequently, they move undetected and unsuspected into the social circles of the "superior" white race. They, too, have served us well in war and in peace.

Racial characteristics have long been advanced as arguments against the assimilation of the Jews here but they too have contributed their services to us in war and in peace. Too frequently one hears the familiar lie that Jews are not assimilated in America as though the Nazi falsehood re-echoed from our own

hills. The familiar statement that Catholics are not absorbed because of a spiritual link with Rome is also too frequently heard.

It is a strange groping for distinction that impels people to divide our population into classes, the superior and the inferior, the light and the dark, the assimilated and the unassimilated, *et cetera, ad nauseum.* Those who do so always identify themselves, of course, with the dominant class. It is this personal identification with superiority that characterizes the incipient oppressor and exploiter of the weak and unfortunate. It is generally these misguided persons who attach to minorities a suspicion of disloyalty unaware that in the attempt to suppress the rights of minorities they themselves are disloyal to American principles and traditions and to America. The contributions to human civilization made by George Washington Carver, Rabindranath Tagore and Hideyo Noguchi, among thousands of others not of Anglo-Saxon stock, long ago destroyed the myth of race superiority although there are a few individuals who still seem to be unaware of it. Race is a myth. Race prejudice is the offspring of ignorance for the lower the descent in the social-scale the more violent and vicious is the hatred of those whose immediate ancestry is different but whose remote ancestry is only believed to differ from one's own.

These are hundreds of Japanese aliens and native-born citizens of Japanese pedigree who have married native whites and whose offspring are of a mixed stock. In a few states the marriage of whites with

those of yellow or dark skin texture is prohibited by miscegenation statutes but in the majority no such statutes have been enacted. The barrier of these statutes has not prevented intermarriage, interbreeding and an increase in the number of children of mixed stock. These statutes have broken down but what they were designed to prevent still goes on and is not likely to be seriously checked. Indeed, it is not unlikely that Divine Providence has intended that one day, by reason of the steady commingling and intermarriage of peoples, there shall be no possibility of race distinction and the myth of race will have been forgotten.

The immigrants, European and Asiatic alike, who came to our shores were hopeful of a better life, expectant of fair treatment and eager to be assimilated. They have brought to America the creeds and customs of the world. Their dwindling adherence to their former customs is understandable and presents no argument against their assimilation. It is true they gather around their churches, Protestant and Catholic cathedrals, Jewish synagogues and Buddhist temples, all worshipping the same Divinity or Spirit albeit in foreign tongues, but their religious beliefs and rituals do not prevent them from being assimilated. Few, if any, of the older generation of Japanese immigrants are Shintoists. Their children are born and reared here. They are grateful to their adopted country. Their children are Americans. Whether or not the children carry a trace of white stock in their blood streams does not bear on their assimilation into

our ways of life. Type of ancestry does not render them disloyal to America. Many persons professing the faith of one religious institution believe those attached to others are subversive and their members disloyal to America in ignorance of the fact that each of these religious institutions preaches a not unworthy gospel in an endeavor to lead people into the living of a righteous, moral and spiritual life. The great majority of these aliens and citizens belong to the very churches to which we belong. These institutions are all devoted to the development of good and loyal Americans.

Consequences of exclusion.

It is to be regretted that these American citizens of Japanese extraction have been greeted with treatment we had thought reserved for prisoners of war especially when it is considered we have not so treated alien enemies owing allegiance to Nazi Germany and Fascist Italy. They are ready, willing and able workers who have contributed their share to our prosperity. We have, by the statute and exclusion orders, lost the benefit of their employment which would add millions to our wealth and lend great weight to our fighting and defense efforts. They have been given little consideration. The American taxpaying public, too, has been given little consideration for it must bear the staggering financial burden of their support for an indefinite period.

It has been reliably estimated that in 1940 there were 7,000,000 persons of German stock and 4,000,000

persons of Italian stock in the United States. These figures comprise those who are foreign born residents of the United States and native born citizens one or both of the parents of whom is foreign born. We then had in this country 1,237,772 foreign born Germans of whom 314,105 were aliens and 1,623,579 foreign born Italians of whom 690,551 were aliens. See John A. Hargood, "The Tragedy of German-America", N. Y. 1940, page 58, and *H. R.* 2124, pp. 230-239. No reliable figures appear to have been computed on the number of native-born descendants of German and Italian ancestry but it would seem safe to assume the figure exceeds 50,000,000 persons. Were military orders to seek the exclusion and internment of these aliens and their citizen descendants as has been the case with the Japanese the country would be largely depopulated. If these military orders possess legal efficacy commanders of military districts can exclude and intern anyone whom they please and be accountable only to their superior executive officers. The insignia of a general seemingly vests mystic powers.

PUBLIC LAW No. 503.

The military authorities were originally skeptical of their own powers under the executive order of the President and doubtful of the validity of their intended discriminatory evacuation orders. They did not, however, request of the President a clarification of the scope and meaning thereof but assumed its validity and that it conferred upon them an arbitrary discretion. They sought, through the medium of the

War Department, by letter of March 9, 1942 (see *H. R.* 2124, p. 167; also *U. S. Code Congressional Service* No. 3, page 281), a penal statute to enforce compliance with their intended future exclusion orders. Surreptitious Public Law No. 503 was the result and even Congress, apparently, was misled as to its purpose for it possesses no features on its face which appear to be of a discriminatory nature. Evidently this enforcement procedure was solicited from Congress without prior consultation with the President and there is nothing in the Act itself which would have put the President on notice that it was intended to be applied in an unreasonable manner or that the military exclusion orders thereafter to be issued would discriminate against citizens on the basis of ancestry.

Public Law No. 503 is a tragic caricature of a statute, conceived in excitement and applied arbitrarily, unreasonably and oppressively. As a penal statute it is to be strictly construed. *Prussian v. U. S.*, 282 U.S. 675; *U. S. v. Fruit Growers Express Co.*, 279 U.S. 363; 59 *Corpus Juris* 1113, Sec. 660(2). It endeavors to penalize the appellant for exercising lawful constitutional rights. It attempts to convert our Courts into an instrumentality of the military power by substituting the United States Marshals for the federal troops to enforce illegal military orders. As applied, it says in effect:

> "If you are an American citizen of Japanese ancestry and do not voluntarily exile yourself for an indefinite period from a geographical zone where you have a right absolute to be under the Constitution and laws you will be forcibly de-

ported in *protective custody* by the military authorities and thereafter remain a *guest* of the federal government under military guard in a *concentration camp* wheresoever and for such time as the military authorities determine. In addition thereto, if you are discovered to be in a region where crime conceivably can be committed against this nation by another person you are guilty of a crime punishable by fine and imprisonment although you have no criminal intent and are not guilty of wrongdoing."

Because of this statutory monstrosity thousands of good, loyal and true American citizens who were unfortunate enough to have had ancestors who, by the accident of birth, were Japanese nationals, have been compelled, by the threat of imprisonment thereunder, to abandon their homes, farms, possessions and rights once considered sacred and face an exile of unknown duration which entails an involuntary servitude forbidden by the Thirteenth Amendment. Those who did not voluntarily leave the proscribed areas and seek exile outside the military district of the Western Defense Command before the freezing order (Public Proclamation No. 4) issued were forcibly removed and imprisoned in concentration camps by the Army.

This Act will one day be celebrated not only for its structural deficiencies but for the mailed fist it conceals and the grave injustice it wreaks upon innocent American citizens. It is a statute used as a lash to compel their exodus. By its threat it dispossesses, scatters, disinherits and deprives them of the privileges of national and of state citizenship simply be-

cause their crime is that they are not of pure-blood white stock. Is this not a recurrence of the myth of Aryan supremacy once sown in the Far East that has yielded the ill harvest of today? Is it not a revival of the infamous fable of the Nietzscheian superman? Is it not akin to the legend of a Nordic master-race utilized by Messrs. Hitler, Goering and Goebbels of Nazi ill-fame and the legend of a yellow imperialism advocated by Tojo and his ilk that has plunged the world into war and accounted for the sacrifice of millions of lives? Is this an example of racial equality we would hold up to the gaze of the thousands of American citizens of Japanese ancestry who are serving in our armed forces to defend with their lives our cherished constitutional rights and liberties? Are these courageous native born youths of America bearing arms to guarantee the imprisonment of their families? Is this an example of racial superiority we would impress upon our dark-skinned Allies, the Filipinos, East Indians, Chinese, Mexicans and Brazilians who make common cause with us in the titanic struggle we are engaged in on far-flung battle fields to establish equality in the world? Is this a precedent we would establish so that Jews, Negroes and other minorities may be suppressed and liberalism be crushed in the post-war period? If it is, the Constitution has been mutilated, Republican Democracy is gone and Liberty is dead.

Public Law No. 503 is void for uncertainty on its face.

The rule has long been established that where the terms of an act are so vague as to convey no definite

meaning to those whose duty it is to execute it, ministerially or judicially, it is inoperative. See 59 *Corpus Juris* 601, Sec. 160, and cases there cited. The Act herein challenged is not only vague and indefinite—it is meaningless. Its incurable legal deficiencies are as follows:

a. Neither a definition of a *"military area or military zone"* nor a declaration of the purposes thereof appears in the Act. What is or may be or might not be a military area or zone and the purposes thereof have been left to speculation and guesswork.

b. No specific military areas or zones are prescribed by the Act. It leaves the number, location and geographical limits, if any, of these areas or zones to our imagination. Whether they have been or will be prescribed at some future date does not appear. It is silent as to who is authorized to prescribe them. Whether they are within or without the geographical confines of the United States is a matter of speculation and guesswork.

c. No specific restrictions on the activities of any person, citizen, civilian or serviceman, are prescribed by the Act. The nature, number, character, extent, duration and limitation of these are also left to our imagination. It doesn't inform us whether they are permanent or transitory in character, flexible or inflexible in nature, prescribed or to be prescribed in the future. It doesn't inform us who has or will prescribe them or vest authority in anyone to prescribe them. Congress has left these matters entirely to guesswork. The very purpose of the restrictions is unmentioned in

the Act. The Act does not enable it to be known what is forbidden and hence is void as a delegation by Congress of legislative power to Courts and juries and the military authorities to determine what acts shall be criminal and punishable. *U. S. v. L. Cohen Grocery Co.*, 255 U.S. 81.

d. The Act fails to disclose the specific or particular executive order or orders of the President, the Secretary of War or military commanders designated by the Secretary of War to which it refers. It leaves unmentioned and to our imagination the number, purposes and contents thereof and fails to reveal whether they have been issued or will be issued at a future date.

e. The Act fails to provide for any notice to be given informing the public of the areas or zones circumscribed or to be circumscribed or of the restrictions applicable thereto. The manner in which the public is to be informed of these areas and of the restrictions applicable thereto is likewise left to imagination.

f. The Act does not disclose the nature of any specific acts of omission or commission which are proscribed or to be proscribed in the military areas or zones but leaves this to vague conjecture. Consequently, it does not adequately inform the appellant of the nature and cause of any accusation against him and hence contravenes the provisions of the Fifth and Sixth Amendments.

g. The Act does not delegate legislative power to the executive branch of government to set up any

military areas or zones or to prescribe any restrictions or regulations governing the conduct of civilians therein. It does not delegate a power to prescribe the type and manner of notice thereof, if any, to be given to the public. Congress is powerless so to do for it cannot delegate legislative power. *Field v. Clark,* 143 U.S. 649, 692; 16 *Corpus Juris Secundum* 349, Sec. 138, and cases there cited.

Although Congress can delegate to the Chief Executive and to his subordinate executive or administrative officials a *limited discretionary authority* to make subordinate rules and regulations in connection with the administration and enforcement of a given law (see 16 *Corpus Juris Secundum* 349, Sec. 138) the Act herein doesn't pretend to delegate such an authority and, obviously, couldn't for want of a Congressional Act which is to be administered and enforced.

Had Congress, either in the Act in question or in another Act, first established definite military areas, reasonable in extent, and restrictions upon the activities of civilians therein to be applied to all citizens on a like basis without discrimination it would then be empowered to delegate to the executive branch of government a limited discretionary authority to aid in the effective administration and enforcement of the Act. However, Congress first must have prescribed therein a policy, standard or rule for the guidance of the executive agency and left to it only the making of subordinate rules, within prescribed limits, and

the determination of facts to which the policy, as declared by Congress therein, was to apply. These are the necessary *conditions precedent* which Congress must impose before the executive branch can exercise a *limited discretionary authority* in the administration and enforcement of an Act. *Panama Refining Co. v. Ryan,* 293 U.S. 388, 55 S. Ct. 241; *Schechter Poultry Corp. v. U. S.,* 295 U.S. 495, 55 S. Ct. 837; 16 *Corpus Juris Secundum,* pages 349 and 352. None of these conditions are satisfied by the Act in question.

It is especially significant that when Public Law No. 503 was presented on the floor of the Senate, Senator Taft of Ohio severely criticized it but expressed an opinion it would probably be enforced in wartime but not in peacetime.*

We do not share the Senator's view that any Court would enforce this Act in wartime. If unenforceable

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*"Mr. President, I think this is probably the 'sloppiest' criminal law I have ever read or seen anywhere, I certainly think the Senate should not pass it. I do not want to object, because the purpose of it is understood. It does not apply only to the Pacific coast. It applies anywhere in the United States where there is any possible reason for declaring a military zone.

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All that does is to let somebody say what a military zone is.

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It does not say who shall prescribe the restrictions. It does not say how anyone shall know the restrictions are applicable to that particular zone. It does not appear that there is any authority given to anyone to prescribe any restriction.

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Mr. President, I have no doubt an act of that kind would be enforced in wartime. I have no doubt that in peacetime no man could ever be convicted under it, because the court would find that it was so indefinite and so uncertain that it could not be enforced under the Constitution."

(See Congressional Record, March 19, 1942, p. 2807. Also: *House Report No. 2124,* 77th Congress, 2d. Sess., May 1942, page 169.)

in peacetime it is likewise unenforceable in wartime. The transition of this nation from a peacetime to a wartime status does not lend validity to a void Act. We regret the Senator's unfortunate expression that seems to indicate a want of faith in the integrity of our Courts. Ours is still a government of laws and not of men. We believe this Court has faith in our Constitution, laws and traditions and the courage to maintain that faith. We believe it will exhibit its characteristic courage and fidelity, in compliance with its oath of office, in declaring Public Law No. 503 void for uncertainty as well as upon the constitutional grounds hereinafter specified. More we cannot and would not ask—less we do not deserve.

Congress cannot ratify executive orders which destroy constitutional rights or which are not in esse.

Congress has the power to ratify action taken by executive officers which gives rise to mere irregularities or technical defects in administration if the *"remedy can be applied without injustice". Graham v. Goodcell,* 282 U.S. 409, 429. See also *Taiko v. Forbes,* 228 U.S. 549; *O'Reilly De Camara v. Brooke,* 209 U.S. 45, and *U. S. v. Heinszen,* 206 U.S. 370. The ratification of prior action taken by administrative officers, where the ratifying intent is ascertained by reference to other statutes, is also permissible, the rule being that what Congress *"could have authorized, it can ratify if it can authorize at the time of ratification." Charlotte Harbor Ry. v. Welles,* 260 U.S. 8. However, whether the ratification is express or implied it cannot validate prior executive action if the

retrospective application of the curative statute affects the substantial rights or equities of a person or his right to an administrative hearing and determination and a judicial review. These constitutional rights must be preserved. See rules established in *Swayne & Hoyt v. U. S.*, 300 U.S. 297, and *Graham v. Goodcell,* supra, summarizing prior cases. Obviously no power resides in Congress to declare criminal the exercise by citizens of constitutional rights and hence any attempt upon its part to ratify executive action destructive of those rights would be void. See also 16 *Corpus Juris Secundum,* page 875, Sec. 422 for rules, and pages 876-877; *Dunkum v. Maceck Bldg. Corp.,* 256 N. Y. 275, 176 N. E. 352; *Buder v. First National Bank,* 116 Fed. (2d) 990, cert. denied 274 U.S. 743. Public Law No. 503 became effective on March 21, 1942, and, therefore, it does not and could not ratify Public Proclamation No. 3 which was issued three days later on March 24, 1942, and could not ratify Civilian Exclusion Order No. 57 which was issued fifty days later on May 10, 1942. Ratification validates prior action—not subsequent action. It is also significant that very substantial constitutional rights and equities of the appellant are here involved for the appellant was denied an administrative hearing as well as a judicial trial.

A statute incorporating future provisions is void.

Neither the proclamation nor this exclusion order is referred to, mentioned in or authorized by this statute or any other statute. How, then, can either be applied so as to punish appellant for the exercise

of acts which are not specifically proscribed by Public Law No. 503 itself or some other act of Congress? It has long been settled that a provision in a statute adopting legislation to be enacted in the future is void. This statute does not and could not confer authority upon the military commander to legislate, in the future, regulations referable thereto. If it could incorporate executive orders at all it would be restricted to incorporating existing ones. The Act herein is void inasmuch as it would penalize defendant for a violation of a proclamation and exclusion order which are not and could not have been incorporated therein by reference.

It has been repeatedly held that a *provision* in an Act which purports to adopt *future provisions* which may hereafter be enacted by Congress is void for uncertainty. *Ex parte Burke* (1923), 190 Cal. 326, 328, 212 Pac. 193. See also: *In re Kinney,* 53 Cal. App. 792; *Rose v. U. S.* (U.S.C.C. Ohio, 1921), 274 Fed. 245, cert. denied, 259 U.S. 655, 42 S. Ct. 97; *People v. Williams,* 309 Ill. 492, 141 N. E. 296; *People v. Eberle* (1911), 167 Mich. 477, 133 N. W. 519, 523, judgment affirmed in *Eberle v. People,* 232 U.S. 700, 34 S. Ct. 464; 59 *Corpus Juris* 618, Sec. 174(3). If the adoption in an Act by reference of provisions to be enacted by Congress at some future date renders a statute void for uncertainty, can it be said that the adoption by reference in an Act of unknown rules or regulations to be legislated in the future by the executive branch possesses the attributes of legality and certainty that lend it validity?

The rule is settled that where a statute makes a reference to some unknown and wholly indeterminate law it becomes too vague and uncertain to be effectual and if a reference to an existing law is so general and the intent so uncertain that it is impossible to determine what law is referred to it is void for uncertainty. See 59 *Corpus Juris* 609, Sec. 165(6), and cases there cited. The Act does not refer to any known law but to restrictions that may be declared *in futuro* in executive orders not *in esse*. The nature of the restrictions and the details of the future orders are left to surmise. The closer the Act is examined the greater is its confusion and senselessness.

It is a general principle of law that Congress can incorporate its own statutes by reference. *Cathcart v. Robinson,* 30 U.S. 264, 280; *Robinson v. Belt,* 187 U.S. 41, 47; *Robinson v. Long Gas Co.,* 221 Fed. 398, 136 C. C. A. 642; *Panama R. Co. v. Johnson,* 289 Fed. 964, affirmed, 264 U.S. 375; *People v. Frankovich,* 64 Cal. App. 184. However, for one department of government to incorporate the fiats or utterances of the others would be an abdication of its own powers. No case in American law seems ever to have decided that Congress may incorporate orders or proclamations of the President or opinions of the judiciary. If this were permissible there would be no reason for the existence of separate divisions of government—one, the executive branch, would suffice and a dictatorship over the people from above would be a reality.

The rules gleaned from the foregoing authorities are that if Congress incorporates one of its own statutes

by reference and the terms thereof are vague or the matter sought to be incorporated is unknown and indeterminate or the reference so general and the intent not ascertainable the incorporation does not cure the uncertainty, but adds to it, and the Act is void. If the incorporated material is matter emanating from another branch of government or unknown matter to emanate therefrom at some remote or future date it merely has accumulated additional vices and defects and is doubly void for uncertainty.

The act does not incorporate executive orders.

An examination of the Act reveals that it does not actually incorporate the two military orders by reference or recite that it was intended so to do. It doesn't refer to or identify any particular executive order. It does not specifically prescribe any military zone and does not set forth any specific restrictions on the conduct of civilians or any person therein or authorize anyone to prescribe any regulations thereon. It does not contain any provision for giving notice to the public of the zones or restrictions applicable thereto. It leaves these important matters to the realm of vagary and the haziest type of supposition and is void. Consequently, the insufficiencies of the Act are not remedied by reference to anything specific or tangible. All is left to imagination, speculation and guesswork. Congress has conjured a grotesque statute and left it dangling in mid-air and resembling nothing of heaven or earth. Its deficiencies are not supplied by the executive orders in any particular and there-

fore it lacks certainty and, in consequence, lacks validity.

It would be an unprecedented and dangerous practice for Congress to incorporate by reference in its own Acts restrictions on civilian activities to be prescribed by military orders to be issued *in futuro* for such would constitute a blanket authorization to the military class to establish a dictatorship and by the rule making power thus legitimated enable it to regulate Congress and the judiciary out of existence or to render them impotent. The practice would constitute an utter abandonment by Congress of the constitutional powers conferred and the duties imposed upon it and reduce it to the status of a rubber stamp to do executive bidding. Strange and novel indeed would it be to discover Congress had been so tarred by the military brush that it was willing to disperse of its own volition and leave the legislative field unopposed to the Army.

The people have never authorized Congress to abdicate its power or to surrender it to the executive department. On July 4, 1776, Congress was not so inclined and was not impotent for it exhibited open hostility to usurpation of power by the military authorities. It declared an unalterable opposition to rule by the military caste in memorable words in the Declaration of Independence, charging misrule by the Crown, "*He has affected to render the military independent of, and superior to, the civil power.*" Has America strayed so far from this declaration—have we become so weak and timid that our vitality

is gone? Are we so unfit to govern ourselves that we must let military commanders do our thinking and legislating for us and abjectly submit to their dictation and permit them to substitute an unauthorized military rule over civilians for the civil rule guaranteed by the Constitution? Are we puppets that we must dance whenever military commanders pull strings?

THE CIVILIAN EXCLUSION ORDERS.

The numerous *Civilian Exclusion Orders* issued by General DeWitt, commencing with civilian exclusion order No. 1 dated March 24, 1942 (7 F. R. 2581), excluded all alien and non-alien Japanese from the areas described therein. By virtue of these orders all these people were evacuated from Military Areas Nos. 1 and 2 in the State of California and from Military Area No. 1 in Washington, Oregon and Arizona by federal troops. As yet they have not been evacuated from Military Area No. 2 in Washington, Oregon and Arizona or from Military Areas Nos. 3, 4, 5 and 6 in Idaho, Montana, Nevada and Utah but they are barred from those areas therein designated as "A" zones in Public Proclamations 1 and 2. In each of these areas, however, they are subject to the *curfew* regulations and *travel* restrictions. They are isolated —their freedom of movement is limited—they are hemmed in and, therefore, imprisoned. Their plight is not easily distinguishable from that of the citizens detained in the concentration camps.

These exclusion orders provided for the transfer of these native born Americans to various assembly or reception centers where they were detained under armed military guards until the Army moved them inland to concentration camps euphemistically called "Relocation Centers" where they are interned for an indefinite period of time. These centers are in control of the War Relocation Authority. (See Executive Order 9102; 7 F.R. 2165.) Six of these relocation centers are situated *within* the military district of the Western Defense Command. Four of them are situated *outside* said district, one at Heart Mountain, Wyoming; one at Granada, Colorado; one at Jerome, Arkansas, and one at Rohwer, Arkansas. (See Public Proclamation WD-1 dated August 13, 1942, published in 7 F.R. at page 6593 on August 20, 1942, which establishes these "War Relocation Projects".) In these centers they are confined under military guard and are subject to restrictive measures. (For example, see order of W.R.A. of Sept. 6, 1942, published in 7 F.R. 7656 entitled "Issuance of Leave", demonstrating that the barbarous European permit system has been introduced to America for these citizens by our own government.)

The general plan of these exclusion orders was to remove all these persons from immense geographical areas not contemplated by the President and having no reasonable relation to the declared purposes of the presidential order. No similar orders have ever been issued by General DeWitt under which American citizens of other racial stock, alien neutrals or alien enemies owing allegiance to Germany, Italy or other

Axis nations have been banned and interned because of their racial origin. Among the legion of military commanders only one has assumed to play this despotic role over the lives of American citizens engaged in civilian pursuits. In none of the other military commands has any such special exclusion, restraint and internment been imposed upon any segment of our citizenry because of a type of ancestry. If it were government for these unfortunate people within our borders would cease entirely.

The arbitrary and capricious character of these zoning proclamations and exclusion orders demonstrates they were not designed for the protection of these American citizens over whom the Army has exercised this extraordinary dominion. Their security was not threatened from any source against which the civil authorities could not give adequate protection. It is significant, too, that in the concentration camps the armed guards are not stationed to prevent the admission of outsiders but to prevent the escape of the internees.

Purpose of exclusion orders.

The exclusion of citizens of Japanese ancestry from the enormous geographical military areas set up by the zoning proclamations and their internment bears no relation to necessary military operations, offensive or defensive, and has no reasonable relation to the necessities or exigencies of war. It is, however, evidence that those responsible for this action are waging against them something that bears a striking resemblance to an unauthorized and undeclared war.

The motive that seems to have inspired this mass deportation seems to have been a capricious desire to banish these citizens permanently from the Pacific States, an objective long sought by baiters of Orientals.

The autocratic and precedent-shattering power wielded over the lives, property and liberties of these citizens simply because of their racial origin is unparalleled in our history. It is one of greater magnitude than has ever been wielded over any of our citizens and is of greater inherent danger to the Republic than any power heretofore exercised.

Has a part of the Army such an aversion to the civil law that it despises constitutional government? Has it waxed so big with power it has become a law unto itself, has seized the reins of government and now would ride roughshod over the people? If it can usurp and wield extra-constitutional power under the belief or pretext it is authorized by a valid presidential order and employ it to suppress the rights of a minority of citizens—does this not presage military suppression of groups on a larger scale in the post-war period—establish a precedent to justify unrestrained military action against the civilian population at some future date?

A few of these imprisoned aliens and citizens have recently been permitted to leave these concentration camps, a few children to return to school to continue their education and a few to seek work in our fields and what other employment, if any, they can obtain. The W.R.A. has announced that in a few months

time it is expected that nearly all of these people, citizens and aliens, will have been released. None of them are permitted to return to their homes in the areas prohibited by General DeWitt however. The fact that they are being released in the mid-western and eastern States casts serious doubt on the statement that they were considered a menace to our security and negatives completely the lame excuse that danger of espionage and acts of sabotage from them gave rise to a military necessity justifying their banishment. The whole of America is a vast arsenal. The midwest and eastern States bristle with more munition factories and defense industries than the western States. If these people had ever been seriously regarded as constituting a menace to our safety none of them would have been released.

The fiction of military necessity.

The Army authorities, as are all citizens, are patriotic and devoted to the public welfare. They would not intentionally have initiated a move calculated to destroy the very Constitution they are bound by oath to *"preserve, protect and defend"*. They were not the original determiners that a military necessity existed that called for such a removal. They assumed the obligation of evacuation forced upon them by politicians and simply carried into execution the instructions they received as they would any other orders imposing duties upon them. They were responsive to the pressure. They probably assumed the task thrust upon them to be a military necessity or duty without inquiry upon their part as to the reasons inspiring it,

the validity thereof or whether it was, in fact, a military necessity. The Army did not conduct an inquiry into the question of a military necessity warranting the removal of these citizens and has never pretended that it did. It has never supplied any statement of facts either supporting or justifying the removal.

The Tolan Committee Report presents a very convincing picture how pressure groups, shortsighted politicians, jingoes operating "under the cover of wartime flag-waving patriotism", professional "patriots", agitators and propagandists endeavored to inflame public opinion against these people. (*H.R.* 2124, pp. 149-150.) Public opinion was not aroused against these people however for the agitation did not create an attitude of war hysteria in the public mind and the acts of violence the agitation was calculated to incite were conspicuous by their absence. That rather sordid economic motives and political reasons prompted a few agitators to howl for mass evacuation and wholesale internment amply appears from the evidence supplied by a number of honest and impartial witnesses. (See excerpts from their statements in *H.R.* 2124, pages 154 to 157.) Nowhere in the Tolan Committee Report does it appear that any military man whatsoever gave any testimony or drew any conclusion that a military necessity existed calling for the evacuation and internment of these people. The military was not originally responsible for this terrible wrong. The Army authorities were saddled with this burden through the machination of politicians, agitators for a white America and political propagandists who served their own selfish purposes and the special

interests of others. See the purposes disclosed in *H.R.* 2124, pp. 150, 154, 155 and 156. Because the Army authorities were compelled to execute the unsolicited duty thrust upon them and have exercised an unconstitutional dominion over citizens engaged in civil pursuits who are subject only to the civil law they must bear the brunt of criticism for this great injustice.

Those Axis nationals who were suspected of being hostile or dangerous to our security were rounded up by the Federal Bureau of Investigation at the outbreak of war under authority of the *Alien Enemy Act.* A total of 12,071 of these aliens were interned in *special internment camps* in North Dakota and elsewhere. The Department of Justice, an executive agency, gave these alien enemy suspects, German, Italian, Japanese and others, administrative hearings. The Wartime Civil Control Administration, an executive agency later set up by the War Department, denied like hearings to the alien Japanese and American citizens of Japanese descent who were evacuated and interned in separate camps under authority of the civilian exclusion orders involved herein. After examining these dangerous alien enemy suspects the Department of Justice released all of the alien Japanese except 1974 to return to their homes. (These figures were announced by Attorney-General Biddle during the week of December 1, 1942, in a survey of the activities of the Department of Justice.)

The alien Japanese and American citizens of Japanese descent who were unmolested by the Federal Bureau of Investigation but were later evacuated and

interned by the Army were not considered a menace by the Department of Justice. Had they been they too would have been taken into custody and have been examined as to their loyalty. It is evident the Department considered them to be loyal. From the total absence of acts of disloyalty upon the part of these people prior to and since their evacuation it must be concluded their loyalty to the United States is undeniable and that the suspicion of them that may have existed in the minds of prejudiced persons who were anxious to see them removed has been proven to have been without foundation. It is significant, too, that had there been exhibited any acts of disloyalty the Federal Bureau of Investigation would have apprehended the culprits and the government would have given press releases thereon and not have treated the matter as a military or governmental secret. Press releases of this nature have been conspicious by their absence. On December 9, 1942, trouble arose in a concentration camp at Manzanar between factional elements and was suppressed by gun-fire. A few newspapers and radio commentators who value truth little and stories highly were quick to seize the opportunity to spread a false story that the trouble arose out of a quarrel between loyal and disloyal internees. The falsity of the story was exposed by D. S. Myer, Director, War Relocation Authority, Washington, D.C., in a letter to Mr. Norman Thomas published in Vol. 8, No. 50, page 8 of *"The Call"*, in New York City under date of December 25, 1942. It is difficult to conceive that a whole segment of our citizenry considered loyal by the Department of Justice could be deemed

to be a menace to our security by the War Department or Army.

In the Opinion of Denman, Circuit Judge, on his dissent from the certification of questions to this Court, appears a statement that at the hearing before the Circuit Court an admission of fact was made that there was a group of young men among these people who had been educated in Japan and who were "dangerously sympathetic with Japan in the present war". The admission consisted of a statement made by counsel for the appellant that an agent of the F.B.I. had informed him that some of those educated in Japan, known as Kibei, were dangerous and that a few witnesses expressed a distrust of them in the Tolan Committee Report. However, if any of the Kibei were agents of Japan or dangerous they would have been taken into custody by the F.B.I. promptly on the outbreak of war and have been deposited in the special internment camps in North Dakota and elsewhere along with the aliens deemed dangerous to our security. There they would have been examined by the Department of Justice and have been released if found to be loyal and have been indicted if found guilty of conspiracy or have been interned for the duration of the war. The Kibei were known to the F.B.I. and had it suspected them it would have examined them individually. The Department of Justice was fully able to cope with the problem of ferreting out subversive elements in the ranks of our civilian population. It reposed its confidence in the Federal Bureau of Investigation. It did not solicit

the intervention of the Army. The military power usurped its functions.

The protective custody fiction.

The appellee has suggested, as an alternative excuse to the military necessity one, that the removal was a precautionary measure designed to protect these people from lawless elements which might have become infected with war-hysteria and have resorted to violence against them but fails to cite a single actual occurrence of any such violence. The lawlessness the appellee mentions failed to materialize. The *protective custody* in which these people are detained was not designed to protect them from trouble from persons outside the concentration camps—imprisonment never is. It was designed as punishment for wrongs they never committed but of which the sponsors of the internment deemed a few in their ranks might be able to commit except for the detention even though these sponsors knew that all aliens deemed dangerous were already in custody of the Department of Justice. Peculiarly enough their hypothesis that harmless alien Japanese and their citizen offspring might contemplate the commission of crime has not been extended to include European alien enemies and their citizen offspring.

Good motive may beget evil.

Good motive is not a sound argument justifying the destruction of citizenship rights. Under the guise of military necessity the technique of fascism operates best. The seizure of power by Mussolini and D'An-

nunzio with their fascist henchmen and the seizure of power by Hitler with his Nazi minions and the Reichswehr wrote the obituaries for civil rights and liberties in Italy and Germany. The dejected Italian and German peoples were given military dictatorships which have brought them to the brink of destruction. Do not these military exclusion orders and the statute herein as part of its enforcement machinery drive this nation along the same path to the same inevitable goal? It is melancholic to discover that what we once termed the "American dream" has been, by these orders and statute, distorted into the "American nightmare". This nation was founded for the very purpose of preserving the liberties of its citizens. What is worth preserving in a nation if it is not the liberty of its citizens?

The fear of incurring military displeasure struck fear into the hearts and minds of these victims and silenced their protests. A like fear infused in the populace succeeded in stifling a large-scale public protest but it did not still public indignation. The American public was not entirely apathetic to what occurred. A part of it was alive to the dangers this removal implied. The danger presented is nothing less than the destruction of democracy. Is it not by just such encroachments on liberties that fascism rears its ugly head—always under the pretense it comes as a saviour and never as an oppressor? Is action which crams the virus of dictatorship down the throat of the public justifiable as a military necessity? If it is democracy has already been dethroned and the regimentation of

the American people has been ushered in. If the conscience of America yet retains its concepts of liberty a halt can be called to this dangerous trend that threatens the security of every American citizen. The damage done to these unfortunates can never be repaired but their liberties can be restored. This Court can supply the antidote for this poisonous virus and give us relief from the internal damages which beset American democracy as a result of these orders and this statute.

EXECUTIVE ORDER No. 9066.

The President's Executive Order No. 9066, issued on February 19, 1942, does not invoke the Alien Enemy Act. It recites that it was executed by virtue of the authority vested in him *"as President of the United States, and Commander in Chief of the Army and Navy"*. Ostensibly it authorizes his military commander *"to prescribe military areas in such places and of such extent as he * * * may determine, from which any and all persons may be excluded * * *"* and to use executive agencies to transport and give accommodation to the persons evacuated. It declares his purpose, in placing this authority in the military commander, to be the taking of *every possible protection against espionage and sabotage to national defense material, national defense premises, and national defense utilities"* as defined in 50 U. S. C. A. 104.

The order is a legislative expression in excess of any constitutional power reposed in the President and inasmuch as it was promulgated without the sanc-

tion of Congress it must have been issued under the erroneous impression it was within the scope of executive authority. Apart from this it is to be presumed it was not intended by the President to be construed to vest in the military commander an arbitrary and uncontrolled discretion in the exercise of the powers presumptively conferred.

Exclusion orders lacked presidential approval.

It is to be inferred the President had neither knowledge nor realization of the discriminatory features of the exclusion orders of his military commander until after the machinery for the mass deportation and exile of American citizens of Japanese ancestry had been set up and the deportation had been accomplished or was well in progress. On June 10, 1942, he asked Congress for an appropriation of some seventy millions of dollars to alleviate their suffering and to provide housing facilities for these unfortunates who had been summarily removed from their homes and were deposited in *"concentration camps"* and are now retained in a sort of *"protective custody"* where they are considered *"guests of the government"*. The apparatus of removal was set up promptly and functioned smoothly. The evacuation was executed with such rapidity that the President who, apparently, had not been consulted thereon, had no opportunity to clarify the scope and meaning of Executive Order No. 9066 and had no chance to curb or countermand the exclusion orders insofar as they were made applicable to American citizens until it was too late. The exclusion orders were ill-advised, premature and

neither intended by the President nor sanctioned by Congress. This conclusion seems to be correct for the President signified his opposition to a general removal of all alien enemies from some sixteen (16) eastern states which had been sought by Lieutenant General Hugh A. Drum, Commanding General of the Eastern Defense Command and First Army, about the middle of June, 1942, according to newspaper reports. We doubt that he would ever have sanctioned the involuntary removal of these citizens. Had he done so it is likely he would also have ordered the removal of German, Italian and other alien enemies together with their citizen children so as to have had his orders impartially applied.

A citizen is not the creature of the state.

The citizen does not exist for the benefit of any division of the government. He is not a creature of the State. The government is his creation and exists for him. The President is the President of American citizens of Japanese ancestry just as much as and no more than he is of all other citizens. They owe him, as a division of government, the loyalty all citizens owe—he owes them the faithful and impartial execution of the laws and the same protection he accords, by reason of his office, all other citizens. He would not, we are sure, abdicate government for them by declaring them outlawed and outside his protection or authorize his military commanders to wage war against them as was once done to all Americans. See *Declaration of Independence,* Par. 25. He could not by temperament be so insensible of the rights of

American citizens as to have authorized them to be discriminated against, to be herded into concentration camps and be detained there under armed military guards and be treated like alien enemies, prisoners of war or cattle on a mere suspicion of possible disloyalty among a few of their members.

Internment was not authorized.

The executive order does not authorize the *internment and imprisonment* of these people. It does not authorize anything but an *evacuation* from areas adjacent to government owned, operated or controlled plants, buildings, structures and premises vital to national-defense purposes as its open declaration of purposes reveals. The provision therein authorizing the Secretary of War *"to provide for residents of any such area who are excluded therefrom, such transportation, food, shelter, and other accommodations as may be necessary"* is not a direction or authorization to do anything except aid in transporting these residents from their places of residence to places outside the boundaries of necessary military areas.

The authority *to evacuate* is not to be construed as the authority *to intern*. Executive Order No. 9066 is not to be construed as a direction for the military commanders to seize and detain any person, alien or citizen, in military or protective custody. It is not to be construed as authorizing any citizen to be exiled or banished. It is not to be construed as ordering the internment or imprisonment of any person in any military camp. It does not designate any American citizen or any alien a prisoner-of-war. The exclusion

orders of the military commander herein and the mistreatment of these citizens has exceeded not only the authorization sought to be conferred by the President but the bounds of reason also.

The removal and internment of Japanese alien enemies, if referable to the *Alien Enemy Act,* was a proper and legal exercise of executive power by the military commander provided, of course, such action was intended or commanded by the President pursuant to an executive order, oral or written. Executive Order No. 9066 contains no express reference thereto. The compulsory exclusion, removal and internment of *American citizens* of Japanese ancestry has no like basis of legality however and does not seem to have been intended by the President under Executive Order No. 9066. This seems to have been action initiated by the military commander pursuant to a notion that the presidential order intended these citizens were to be classified as alien enemies, be restrained of their liberties along with Japanese aliens and be interned. Mistaken or deliberate, however, it is a power usurped by the military commander whether intended by the presidential order or merely referable thereto but unsanctioned by it. The fact that military orders are referable to or claimed to be referable to a presidential order is not a guaranty of validity even if it does seem to have an hypnotic effect upon a few minds or the mass-mind and herein lies a danger of great gravity. It is usually from those who pass as the great of the world that we have the most to fear. Whence does the military power derive

authority to treat American citizens as chattels and to reduce them to a state of servility and bondage? Did we not fight one war to destroy human slavery?

WAR POWERS.

The theory upon which the government relies upon this appeal to support its contention of the validity of the military orders and statute involved is as follows: Under his war powers the President, or military commanders under him, can set up enormous geographical military areas embracing the whole or any part of this country and arbitrarily and capriciously exclude therefrom and intern citizens engaged in civil pursuits. The argument is simply that the Constitution from which the President derives all his power may be suspended by him in wartime and that he may thereupon substitute a military government over civilians in such areas in lieu of civil government. Reduced to its essence the argument is one for the introduction of a dictatorship which would assume complete control of all civilian activities. This would reduce Congress to a rubber stamp to do Executive bidding and would reduce the civil population to the level of a herd of brutes. We would be left to hope that constitutional government would be restored when the war or emergency terminated. It is significant, however, that America has never yet enjoyed an era in which it could not be asserted that a national crisis, emergency, war or threat of war did not confront us, consequently our liberties would not

be restored. The government's contention is that during wartime a state of anarchy or dictatorship exists —that the highest power is no longer the Constitution but irresponsible and uncontrolled military fiats. Such a contention and the vicious doctrines it incorporates and implies was expressly repudiated by a unanimous Court in the *Milligan* case.

Wartime powers of the President must find their origin either in the Constitution or in acts of Congress or they do not exist. The chief executive is not a power unto himself. The restrictions of the Constitution fix the field in which his authority is operative. Congress translates the will of the American people into law. The President is the executor of these laws. He has neither peacetime nor wartime powers not conferred by the Constitution or Congress. The powers to declare war, to raise and support Armies, to provide and maintain a Navy and to supply the executive branch of government with the troops, munitions and the means necessary to wage war successfully are the exclusive prerogatives of Congress. (See Art. I, Sec. 8, subds. 1, 10-18, U. S. Constitution.) The President is made, by Article II, Section 2, the "Commander in Chief of the Army and Navy", but this is a mere declaratory clause—there is nothing for him to do until Congress, under its constitutional powers, provides him with the means therefor. He has the active direction of troops in the field but no like authority over civilians. He is amenable to the laws of the United States and is neither above nor beyond them. If there be no law for him to exe-

cute he cannot act. If he is not provided with the means to act he is powerless.

The precise powers of the President are enumerated in Sections 1, 2 and 3 of Article II of the Constitution. By this vestiture of executive power and also by his oath of office (Cl. 8, Sec. 1, Art. II) he is limited to executing the laws of the United States. In the absence of laws he is not empowered to act, but is required, by the mandate of Section 3 of Article II to recommend the laws or measures he judges *"necessary and expedient"* to Congress for consideration and adoption and, as an instrumentality to obtain their passage, he is empowered *"on extraordinary occasions"* to *"convene both Houses"*. In issuing his order he neglected to follow this procedure and, consequently, neither he nor his military commanders have ever been authorized to set up any military zones or to prescribe restrictions on civilian activities therein. Such orders, therefore, cannot have application to the civilian public. They can affect only those engaged in the military service and the civilian personnel employed by the executive and administrative offices of the federal government. His order and the orders of his military commander as applied herein are not, therefore, authorized by the Constitution or Act of Congress and are ineffectual as law. *Muir v. Louisville & N. R. Co.*, 247 Fed. 888.

On its face the presidential order reveals that it does not derive its authority from an Act of Congress. It recites, in its own justification, an authority vested in him *"as President of the United States, and*

Commander in Chief of the Army and Navy". Inasmuch as the Constitution neither expressly nor by implication vests such a power in him and Congress has not conferred such upon him its exercise and application are *extra-constitutional.* The exercise of extra-constitutional powers would render the wielder greater than the people. It would make him master instead of the servant of the people and would make a mockery of the government we know as a Republic and term a Democracy. Public Proclamations, Nos. 1, 2, 3 and 4 and Civilian Exclusion Order No. 57 issued by the military commander herein, insofar as they affect American citizens, proceed from a mistaken opinion that such a power is an executive one reposed in the President by the Constitution and is delegable to his military commander. They are void as extra-constitutional abuses of power whether the motives that impelled their issuance were good or evil.

There is no graver danger to American democracy than government by executive fiats which usurp legislative and judicial power. One usurpation of power leads to another and each is destructive of republican rights. In critical times there are always to be found a few who would sacrifice—the rights of others. They would be the first to wail if their own rights were threatened. Does America desire a government by executive fiats? The great majority of our people desire nothing of the kind whether they be articulate or silent on the question. Representative government is challenged by these military orders. Are we witnessing the breakdown of democracy and the specter of a dictatorship arising from the grave of constitu-

tional government? Is America, long regarded as the last sanctuary of freedom, so blinded to libertarian views that it is to permit a dictatorship over its people to emerge triumphant from the world struggle?

War does not suspend the Constitution.

If the appellee does not rely upon the martial law theory it must believe the power here exercised over citizens is pursuant to some broad but undisclosed, undefined and undiscoverable wartime power vested in military officers which authorizes the conversion of immense geographical areas into gigantic military reservations wherein the civil power is negated and the military power is supreme. Such, however, is wholly illusory. No such power is conferred by the Constitution. The only law the military authorities can enforce is the law of the United States derived directly and immediately from the Constitution itself or mediately from it through statutes of Congress. Neither Congress nor the Executive Department is authorized to wield extra-constitutional power. The war powers of the federal government are subject to the applicable provisions and limitations of the Constitution which is not superseded by war. Neither the Constitution nor constitutional rights can be suspended in wartime and war measures fall if rights guaranteed by the Constitution are infringed or taken away thereby. *Ex parte Milligan*, supra; *Despan v. Olney*, supra; *Corbin v. Marsh*, supra; Chief Justice Hughes's comments in *Sterling v. Constantin*, 287 U. S. 378, 402; *U. S. v. Bernstein*, 267 Fed. 295. The existence of a state of war does not suspend the guar-

antees of the Fourth, Fifth, Sixth and other Amendments guaranteeing personal security, due process of law and property from being seized without just compensation. *U. S. v. L. Cohen Grocery Co.*, 255 U. S. 81; *Hamilton v. Kentucky Distilleries*, 251 U. S. 146; *Ex parte Harvell*, 267 Fed. 997; *Willson v. McDonnell*, 265 Fed. 432, error dism. 257 U. S. 665, 42 S. Ct. 46; *Griffin v. Wilcox*, 21 Ind. 370. See, also: *Gulf Refining Co. v. U. S.*, 58 Ct. Cl. 559; *Borland v. U. S.*, 57 Ct. Cl. 411; *Lajoie v. Milliken*, 242 Mass. 508, 136 N. E. 419; *Highland v. Russell*, 288 Pa. 230, 135 A. 759. Consequently, in the absence of conditions creating an actual war arena where martial rule necessarily prevails in the *"theater of war"* as defined in the *Milligan* case constitutional guaranties cannot be suspended or destroyed by the military authorities or by Congress.

Spurious martial law question.

There is no merit to a contention that the seizure, evacuation and internment of American citizens is pursuant to a state of martial law. Neither the presidential order nor the military orders constitute a recognition of martial rule or of a state of facts justifying such a rule. The authority to suspend constitutional rights exists only where martial law has been declared or where martial rule prevails. The power to proclaim and institute martial law *within* the continental limits of the mainland United States is a legislative one lodged exclusively in Congress. *Ex parte Milligan*, 4 Wall. (U. S.) 2, and *Despan v. Olney*, 7 Fed. 3822. It is not a presidential power. Congress

has not declared martial law applicable to any region on the mainland of the United States because it has not seen any necessity for the application of martial rule within our boundaries. The President has not attempted to usurp or to apply martial law to any area within our jurisdiction. Had he desired this type of rule to be applied to any region he would have sought a proclamation of martial law from Congress.

Martial law within the United States can be invoked only in a *theater of war,* which is an area where actual conflict rages and an invasion prevents the civil law-enforcing agencies from functioning and effectively closes our Courts. *Ex parte Milligan,* supra. The Pacific States are not within a theater of war. Our Courts and other law-enforcing agencies have been open and functioning in a normal manner and the military forces have not been needed to preserve law and order. Of these facts this Court has judicial knowledge and takes judicial notice.

Martial rule can be a reality and a military government of a provisional nature can be established *outside* the continental limits of the United States without a declaration thereof by Congress. This occurs when our armed forces invade, conquer and occupy enemy territory. It is a temporary jurisdiction exercised over the occupied territory and its inhabitants for the purpose of promoting the military operations of the occupying forces and of preserving the safety of the inhabitants. See 67 *Corpus Juris,* 421, Sec. 171 B and cases there cited.

Conceivably it could be a reality *inside* our borders and without a declaration thereof. The arrival of hostile troops would be such a declaration in itself. But martial rule in such an event would be limited to the actual *"theater of war"* where the conflict raged and offensive and defensive military operations necessitated the appropriation of the area circumscribed thereby. In such a case the civil law-enforcing agencies could not, by reason thereof, operate therein. The right of civilians to remain therein would impede military operations and, consequently, could be curtailed and civilians would be subject to expulsion therefrom and to punishment for violation of military commands.

However, the military authorities here, *outside* any *theater of war,* have set up immense comprehensive zones having no reasonable relation to military operations. The proclamations and exclusion orders do not pretend they have any such relationship. They were set up under a claim they were designed to accomplish the objectives set forth in Executive Order No. 9066, namely, protection against espionage and sabotage to national defense material, premises and utilities. The military authorities appear to have misconstrued the legal phrase *theater of war* to mean *theater of operations* which, in military parlance as used in the zoning proclamations, is synonymous with *military district* which embraces eight whole states.

It is settled that where the Courts are open and have not been expelled by hostile force from the outside the Constitution and laws apply and a citizen not

connected with the military forces cannot be punished by the military power of the United States and is not amenable to military orders. *Griffin v. Wilcox,* 21 Ind. 370; *Ex parte Milligan,* supra. Even when martial law is properly invoked the will or power of the military commander is not to be exercised arbitrarily. *Despan v. Olney,* supra; *Ex parte Jones,* 71 W. Va. 567, 77 S. E. 1029, 1034, 45 L. R. A. (N. S.) 1030. *Within* the United States martial law, when proclaimed, must be administered and enforced in accordance with the Constitution and it cannot be used as justification to deprive a private citizen of his personal or property rights secured thereby unless he is an enemy to the government and has been guilty of an overt hostile act to the government. *Corbin v. Marsh* (Ky.), 2 Duv. 193.

Under the *Milligan* decision civil rights and liberties guaranteed by the Constitution to a citizen cannot be suspended by the military power and the military power cannot regulate the conduct of civilians unless the law-enforcement agencies of civil government have broken down in the area circumscribed by the theater of war and are not functioning and cannot function by reason of the circumstances, conditions or fortunes of war at the focal center of the conflict. The breakdown of such agencies must not be occasioned by the mere whim or caprice of the military authorities but by the actual existence of active warfare in the zone of military operations. See also: *Bishop v. Vandercook,* 228 Mich. 299, 200 N. W. 278; *Allen v. Oklahoma City,* 175 Okla. 421, 52 Pac. (2d) 1054, 1058; *Griffin v.*

Wilcox, supra. See also: 67 *Corpus Juris* 425, Sec. 186 (D) and p. 426, Sec. 187(2).

The civil law enforcing agencies have not ceased functioning in the Pacific States, consequently, neither "martial law" nor a "limited martial law", nor a "partial martial law", nor a "quasi martial law", which are phrases coined by apologists for military misrule, is operative. See *Constantin v. Smith,* 55 Fed. (2d) 227, 239, appeal dism. 287 U. S. 378, 53 S. Ct. 190; *Griffin v. Wilcox,* 21 Ind. 370, 377; *Bishop v. Vandercook,* 228 Mich. 299, 200 N. W. 278. See also 67 *Corpus Juris* 426, Sec. 187(2) where the rule is stated:

> "Martial law or rule cannot exist in company with civil law or authority, nor unless and until the civil power is suspended, for if the civil law is in force and civil authorities are acting thereunder martial law cannot be in force either in whole or in part in the same territory."

Whence does the military authority derive this awful, autocratic and arbitrary power to judge American citizens without hearing, intern them and treat them as prisoners of war? If it has this right it can turn all the oppressive weight of military power against other minorities and against the people as a whole on any pretext. If right it has it is not derived from the presidential executive order which is an indefensible legislative expression. It is not derived from statute or the Constitution. The Army has gone beyond, grasped and wielded unlawful power. Until the Courts restore the rights of these citizens

civil government for them does not exist—an arbitrary government depending upon the whim of a military commander is the substitute.

Geographical confusion.

Has not the military commander who issued these coercive orders confused his geography and the locus of the war? This war is being fought abroad—outside the continental limits of the United States. America is not imperiled by her enemies today as she was in the Revolutionary War, the War of 1812 and the Civil War. In 1775 the foe was in our midst occupying as much of our soil as we did; in 1812 the foe sacked and burned our national capitol and in 1861 our rebel brothers bid fair to capture the whole country. The appellee would have us believe, on the authority of statements in the opinion of the District Court below, 46 Fed. Supp. 657, that a fugitive shelling in the vicinity of Puget Sound from unknown sources, a vagrant and ineffective shelling of uninhabited terrain in the vicinity of Ventura by what is suspected to have been an unidentified submarine and the suspected dropping of an incendiary bomb in an obscure Oregon forest create a *theater of war* which embraces the greater part of eight western states. Would the appellee suggest that war which develops a high order of personal courage in our fighting forces, in the face of such trifling incidents, produces a correspondingly low moral courage in our civilian ranks? Does the appellee believe the civil authorities are so wanting in courage to enforce the civil law in time of

war that this justifies the suspension of civil rule on the theory that our civil authorities become incompetent because they are infected with fear and unable to perform their duties? Acute panic reigning in a few minds may produce a battle ground in their mental recesses but does not create a geographical theater of war in reality.

Military government over civilians is unconstitutional.

As Commander in Chief of the Army and Navy the President, in time of war, is empowered to establish or direct the establishment of a temporary *de facto* civil government, under military jurisdiction, in *invaded* or *conquered* territory. *Hamilton v. Dillin,* 21 Wall. (U. S.) 78, 22 L. Ed. 528; *Texas v. White,* 7 Wall. (U. S.) 700, 19 L. Ed. 227; *Cross v. Harrison,* 16 Howard (U. S.) 164, 15 L. Ed. 889; *U. S. v. Gordin,* 287 Fed. 565; 67 *Corpus Juris,* 422, sec. 175(2). But a military government cannot be established in *domestic territory* unless it is in a state of rebellion or civil war. *Heffernan v. Porter,* 6 Coldw. (Tenn.) 391, 98 Am. Dec. 459; *Ex parte Milligan,* supra; and 67 *Corpus Juris,* 422, sec. 176(3). The President, as Commander in Chief, has not ordered the Army to occupy the Pacific States under a belief that this area was in a state of rebellion or insurrection or that hostile forces were in possession of the area. What the military power has attempted to do in this region, however, is to set up an unauthorized limited military government or a limited provisional government over a segment of our civilian

population on a race discrimination basis in the absence of any such circumstances. It was precisely the exercise of this type of usurped power over the civilian population by the military class of Britain that evoked the open hostility of the early colonists and produced the Declaration of Independence wherein Continental Congress condemned the practice. This area is not under the heel of the enemy and will not be. This area is not held by an army of occupation of our own forces. The war powers of the Executive do not license him or his military commanders to use our troops to make war against American citizens who are not in a state of rebellion or insurrection.

THE PROSECUTION FAILED TO SUSTAIN ITS BURDEN OF PROOF.

The military orders involved herein all stem from Executive Order No. 9066 and consequently were designed to prevent acts of espionage and sabotage to national defense material, premises and utilities which was the declared purpose of the presidential order. Such unlawful acts are made felonies under 50 U.S. C. A. 101 punishable by 30 years imprisonment and $10,000 fine. The appellant was not charged with any such crime. Had the prosecution been able to prove any such criminal act or a conspiracy to commit any such act on the part of the appellant it would have offered evidence thereon at the trial below. The appellant was charged and convicted of a violation of the curfew regulation of Public Proclamation No. 3

and of a violation of Civilian Exclusion Order No. 57 which were made punishable under Public Law No. 503. The gist of the charges against him, therefore, was simply that he, as a citizen engaged in civilian pursuits, was exercising lawful citizenship rights common to all citizens.

Military action taken against a participant in a rebellion or insurrection is justifiable provided the measures taken are "conceived in good faith, in the face of an emergency, and directly related to the quelling of the disorder or the prevention of its continuance". In such cases the executive or military commander "is permitted range of honest judgment as to the measures to be taken in meeting force with force, in suppressing violence and restoring order". The taking of such measures where a rebellion or insurrection has broken out is not conclusively supported by *"mere executive fiat"* however. (*Sterling v. Constantin,* 287 U. S. 378; *Moyer v. Peabody,* 212 U. S. 78.) Neither the appellant nor any of these excluded citizens were engaged in any rebellion or insurrection. There is no evidence in the record of any such criminal conduct upon the part of the appellant. Had he or any of these citizens been engaged in such unlawful acts they would not have been charged with the commission of a mere misdemeanor under Public Law No. 503 but with treason which carries a death penalty. Had he or any of these citizens been guilty of espionage or sabotage they would have been charged with a violation of Title 50

U. S. Code, Sec. 101, a felony made punishable by 30 years imprisonment and a $10,000 fine.

In a criminal proceeding the burden of proof of the elements of crime rests upon the prosecution. The military orders involved herein are "mere executive fiats" which, on their faces and as applied herein, discriminated against the appellant solely by reason of his race, color or the geographical origin and old nationality of a few of his ancestors and therein abridged his fundamental constitutional rights and liberties. No factual basis for the application of these orders to the appellant was established by the prosecution at the trial below. The failure of the prosecution to show that the appellant was guilty of anything but being where he had a right to be and doing what he had a right to do on a like basis as other citizens under the Constitution is an admission that his conduct was lawful. It is also an admission that it could not prove any substantial reason to support the application to him of these military orders which abridged his fundamental constitutional rights. The government failed to sustain its burden of proof. In the absence of any such evidence the only presumption that can be drawn from the face of these orders is that they were applied to the appellant and other citizens solely by reason of his race, color or the geographical origin and old nationality of a few of his ancestors. The proclamation, orders and statute are, therefore, unconstitutional and void.

CONSTITUTIONAL RIGHTS INVADED.

Statute and orders are void as denying equal protection of the laws forbidden by the Fifth Amendment.

The military orders and Public Law No. 503 which gives them effect make the constitutional rights of citizens dependent upon their ancestry. If of *white pedigree* these rights are still considered to be indestructible—if of *yellow,* destructible. If this discrimination among citizens may be made ancestral background has assumed an exaggerated and amazing importance and citizenship has lost its significance. The exclusion orders and statute thereby appear to grant the title of nobility of *"White"* or *"Aryan"* to all citizens except those whose lineage is Japanese. Is this not prohibited by Article I, Section 9, clause 8 of the Constitution? When the rights of American citizens become dependent upon either their ancestry or complexion equality before the law vanishes. It is extraordinary that rights are denied to a group of citizens simply because a few descendants of Adam and Eve assert that other descendants of Adam and Eve are not related to them.

The white race is a product of the imagination. There is no pure race—there is only mixture. Even the detested Nazi Aryan is a Baltic admixture and not free from a touch of Mongol blood—the Hun in him has twice put in an appearance during our generation. The loose term "white" does not mean an "albino" but a "pink" as George Bernard Shaw has so acutely observed. Nevertheless, the orders seem to indicate that a citizen must be classified as "white"

in order to enjoy the traditional blessings and privileges of citizenship. They seem to have been inspired by a notion that the so-called "white man" is a special creature of God and destined, by reason of his complexion,—to be eternally suspicious and distrustful of his darker-skinned brothers even though they be fellow-citizens. The division of our citizenry into special types for the receipt or withholding of rights, privileges and benefits is a dangerous policy not only as has here been practiced but also in its implications. Discrimination against citizens by reason of race or color is expressly forbidden by Congress in the *Civil Rights Statutes.* See 8 U. S. C. A., Secs. 41, 42 and 43. Compare also, 18 U. S. C. A., Secs. 51 and 52.

There is no higher title in America than that of *"citizen"*. Whether acquired by birth or naturalization citizenship is not a thing of degrees. It is an absolute and indivisible status. It does not depend upon race, color or creed. Public Proclamation No. 3, Civilian Exclusion Order No. 57 and the similar sweeping exclusion orders issued by the military authorities and Public Law No. 503 discriminate against defendant and other citizens of Japanese ancestry on the basis of race and color. They are, therefore, unconstitutional and void as a denial of the *"equal protection of the laws"* which is forbidden by the *"due process clause"* of the *5th Amendment.* The legal significance of the due process clauses of the 5th and 14th Amendments is identical. (*Heimer v. Donnan,* 285 U. S. 312; *Hibben v. Smith,* 191 U. S. 310; 16 *Corpus Juris Secundum* page 1141.) The *"equal pro-*

tection of the laws" is guaranteed by the *"due process"* clause of the *5th Amendment* which is not suspended by war. (*U. S. v. Yount,* 267 Fed. 861; *Sims v. Rives,* 84 Fed. (2d) 871, cert. denied 298 U. S. 682, 56 S. Ct. 960.) Due process of law forbids *racial discrimination.* (*Yu Cong Eng v. Trinidad,* 271 U. S. 500, 528.)

These orders have not been applied so as to discriminate against any other type of citizen whether native-born or naturalized. That *native-born citizens of other ancestry* should enjoy greater rights in America is an evil in itself. That *naturalized citizens* should enjoy greater rights and liberties in America than the native-born is a negation of equality. That *aliens* here from neutral countries should enjoy greater rights than these unfortunate people is unwarranted. That *Japanese nationals* here should enjoy rights equal to theirs is indefensible. *That alien enemies, nationals of Nazi Germany and Fascist Italy, should possess greater rights, privileges, immunities and liberties in America than these native-born citizens is a negation of citizenship and a disgraceful travesty on justice.*

These native-born Americans are part and parcel of America—they have contributed to America—this is their country as much as ours. What have they done that they deserve treatment we thought reserved for prisoners of war? What have they done that they are denied the equalities to which all citizens are entitled? What have they done to merit such ill-treatment? Nothing. Either they are political pawns or

a few among them are suspected by the military authorities or political pressure groups of constituting a possible source of treasonable intention and activity, and therefore, whole communities of these unhappy people are uprooted and interned as enemies of the government. Does the Army suspect that there may be spies or saboteurs in their ranks? It made no pronouncement thereon prior to the evacuation. It is not the police agency of the federal government—it is the military agency. The duty to guard us against spies and saboteurs among the civilian population in this country is lodged in the Department of Justice which is competent to cope with this problem. The Military and Naval Intelligence officers can lend it assistance but for the Army to usurp the functions of the Department of Justice is an unwarranted interference with the federal administration of justice. *For the Army to intern any citizen is an usurpation of judicial power and an interference with judicial administration.* Who suspects these citizens—who accuses them of disloyalty or of any subversive acts? The dissenting opinion of Denman, Circuit Judge, to the Certificate of Questions propounded shows no such acts were committed.

Loyalty is a product of nationality.

Loyalty to the government cannot be determined along ethnic lines. To judge the loyalty of citizens upon such a basis would destroy national unity. America is a vast melting-pot that has welcomed immigrants from the four quarters of the globe and has conferred upon them the mantle of citizenship—a

status of legal equality transcending all theories of race, color and creed. What has happened to these citizens of Japanese forebears has instilled fear in the hearts of loyal Germans and Italians here and their native-born citizen issue and depressed public morale. Loyalty has no connection with ancestry. It is a product of nationality. These citizens are nationals of the United States and their loyalty is undeniable.

Whence does the Army derive authority to play this omnipotent role over the lives of these citizens? Not from the President—not from Congress. It is not empowered to determine whether there is a necessity for depriving citizens of their statutory and constitutional rights. Congress alone can give and take away statutory rights, but not even Congress can take away constitutional rights. The Constitution is still the *"supreme law of the land."*

Bill of attainder.

The statute, Public Law No. 503, is a Bill of Attainder as applied to defendant and to other citizens of Japanese ancestry and hence is repugnant to the provisions of Art. I, Sec. 9, cl. 3 of the Constitution. It is a law which, by the threat of its application, encourages and aids the military authorities, without judicial trial, to expatriate or banish a citizen not for the commission of crime but solely by reason of race or color. *In re Yung Sing Hee* (C. C. Or.), 36 Fed. 437; 16 *Corpus Juris Secundum* 902-3.

Abridgement of fundamental liberties.

Civilian Exclusion Order No. 57 and Public Law No. 503 which is an instrument designed to intimidate and coerce these citizens of Japanese descent into compliance with the fiats thereof are unconstitutional and void on their faces and as applied to appellant herein. They are arbitrary, unreasonable and oppressive. They deprive him and all other citizens of similar ancestry, within the areas prescribed and beyond said areas, of the fundamental *"privileges and immunities"* of citizens guaranteed by Art. IV, Sec. 2, Cl. 1 of the Constitution. See *Corfield v. Coryell,* 4 Wash. (U. S.) 371, 6 Fed. Cas. No. 3,230; *Hague v. C. I. O.,* 307 U. S. 496. These *"privileges and immunities"* are implied, are inherent in citizens and arise as an incident to national and to state citizenship (see Sec. 1, 14th Amendment) and are safeguarded to them by the *"due process" clause of the 5th Amendment.*

What are these rights? They have been termed *"rights so vital to the maintenance of democratic institutions"* (*Schneider v. Irvington,* 308 U. S. 147, 161); the *"immutable principles of justice which inhere in the very idea of free government"* (*Holden v. Hardy,* 169 U. S. 366, 389); and the *"fundamental rights which belong to every citizen as a member of society"* (*U. S. v. Cruikshank,* 92 U. S. 542). Included among them is *"protection by the government"* and the *blessings of life, liberty and property* (*Corfield v. Coryell,* supra); *"freedom of movement"* (*Crandal v. Nevada,* 6 Wall. 35, 48-9; *People v. Ed-*

wards, 314 U. S. 160, 62 S. Ct. 164; *Williams v. Fears,* 179 U. S. 279); the right *"to live and work" where one wills* (*Allgeyer v. Louisiana,* 165 U. S. 578, 589); and the *"right to establish a home"* (*Meyer v. Nebraska,* 262 U. S. 390, 399; *Truax v. Raich,* 239 U. S. 33, 41.) The right to *earn a livelihood* too is necessarily one of these fundamental rights. Of all of these rights the appellant and other unfortunate citizens have been deprived without the *"due process of law"* guaranteed by the 5th Amendment.

Unreasonable search and seizure.

Civilian Exclusion Order No. 57 is unconstitutional and void on its face and as applied to appellant herein and to all citizens of Japanese ancestry upon whom it operates in that it compels him and them, under threat of prosecution under Public Law No. 503, without any hearing of any sort, judicial or administrative, to abandon home and possessions and seek exile. If they fail so to do they are thereunder summarily seized by federal troops and confined to concentration camps for such time as the military authorities may determine. This is not only a compulsory banishment for an unknown duration but is also an internment indistinguishable from that which we impose upon prisoners of war. This treatment is meted out without charging or accusing them with the commission of crime or the intent to commit crime. The appellant and other citizens of Japanese ancestry have been seized and imprisoned in these camps by the military authorities in violation of the *"unreasonable search and seizure"* clause of the *4th Amendment.*

The appellant and others have been arrested without warrant issued upon probable cause and supported by oath or affirmation particularly describing the person to be seized in violation of the provisions of the 4th Amendment and, thereafter, have been charged with a violation of Public Law No. 503 which is nothing but a charge of having Japanese ancestry. The fact the country is at war does not justify such arrest. The exclusion order violates the *4th Amendment* and the *"due process"* clause of the *5th. Casserly v. Wheeler* (C. C. A. Cal.), 282 Fed. 389.

Deprival of liberty without due process of law.

Neither the exclusion order nor the statute adequately informs appellant of the nature and cause of any accusation against him and, consequently, both are void as repugnant to the *5th* and *6th Amendments*. Reduced to their essence this exclusion order and similar ones issued by the military authorities do precisely this: They accuse citizens of Japanese ancestry of an undefined and indeterminate crime, prejudge them without a hearing or trial of any character, judicial or administrative. They find them guilty on a nebulous suspicion lacking the dignity of evidence and existing only in the minds of those responsible for these injustices. The suspicion is elevated to a conclusive presumption of guilt and they have no opportunity to protest, to establish their innocence and prove their loyalty. After prosecution under the statute, or without such prosecution, these people are, under the exclusion orders, arrested by the troops and cast into concentration camps where

they remain interned under military guards until such time as the Army sees fit to release them. Can this treatment be said to constitute the *"due process of law"* guaranteed by the *5th Amendment?* It cannot. It has been repeatedly held that the *"existence of a state of war"* cannot and does not suspend or destroy the guaranties and limitations of the *5th* and *6th Amendments.* See *U. S. v. L. Cohen Grocery Co.,* 255 U. S. 81; *Hamilton v. Kentucky Distilleries,* 251 U. S. 146; and also, *Northern Pacific Ry. Co. v. North Dakota,* 250 U. S. 135; *Juillard v. Greenman,* 110 U. S. 421; *U. S. v. Russell,* 13 Wall. (U. S.) 623; *McCulloch v. Maryland,* 4 Wheat. 316; *Strutwear v. Olson,* 13 Fed. Supp. 384.

Taking private property without just compensation.

These exclusion orders also discriminate against and deprive these citizens of the possession of their homes, farms and possessions which they are compelled to leave behind them when they are exiled. Does this not constitute a taking of private property under a claim that it is for public use or necessity without just compensation and therein violate the provisions of the Fifth Amendment also? See 67 *Corpus Juris* 373, Sec. 62, and p. 373, Sec. 66, and cases there cited. The right of requisitioning and expropriating private property for war purposes is recognized when it is an urgent military necessity but it must be accompanied or later followed by compensation in order to satisfy the requirement of the Fifth Amendment. *Smith v. Brazelton,* 1 Heisk. (Tenn.), 44, 2 Am. R. 678; 67 *Corpus Juris* 373 and

376 and cases there cited. These citizens have been deprived of the means of earning a livelihood and of the possession of their properties without compensation and in the absence of any military necessity or urgency.

Congress is vested with power by Art. I, Sec. 8, Cl. 11 of the *Constitution* to confiscate property of the enemy. See also, 67 *Corpus Juris* 388, Sec. 102(b). No similar power over the property of citizens or aliens within this country, however, resides in Congress or in the military forces unless based upon urgent military necessity in the theater of war and followed by compensation as required by the *Fifth Amendment*. The property of these citizens has been confiscated as though it were captured enemy property without color of any statutory right and in violation of the constitutional guarantee.

Deprival of a judicial trial.

Public Law No. 503 is, in form and effect, a threat to American citizens of Japanese ancestry to submit to the military rule displayed by Public Proclamation No. 3 and Civilian Exclusion Order No. 57 and similar exclusion orders issuing from military sources under penalty of being prosecuted under its terms. It is a whip used to drive them from civil ~~and~~ to military jurisdiction. If enforced as law our Federal Courts would become an instrumentality of the military power and be converted into mere courts-martial. The military power would then exercise an unchecked control over these unfortunate civilians and have the power to determine whether or not these unhappy victims of

oppression are entitled to the privileges of citizenship. The military authorities have usurped judicial functions—they have tried *in absentia* and *in camera* and *without right* a whole segment of our citizenry and condemned it without accusation or hearing to banishment and internment.

The destruction of the rights, personal and property, of the appellant and other American citizens of Japanese ancestry under a claim of military urgency, necessity or emergency is without a foundation. Neither ulterior design nor suspicion of disloyalty reposing in the minds of the military authorities or others is a legal justification for such action. That the military class instead of Congress should have the right, to determine that such a necessity exists in an area within our boundaries and outside a theater of war where martial law has no application, would result in military absolutism. If upheld, these military exclusion orders have the effect of announcing the debasement of our Courts.

In subjecting appellant to forcible removal by the federal troops from a place where he had a legal right to be without first accusing him of crime and offering him the opportunity to be heard in his own defense Exclusion Order No. 57 deprives him of the *right to a speedy and public trial* and the incidents thereof, including the right of counsel, in violation of the *Sixth Amendment* of the federal Constitution. One has the right to be informed of the nature of the accusation against him. *U. S. v. Potter* (C.C. Mass.), 56 Fed. 83, 88, reversed on other grounds, 155 U. S.

438. The right of a *citizen* to be informed of the nature and cause of accusation against him and to a fair trial is not suspended by a state of war and even Congress cannot deny this right guaranteed by the *Sixth Amendment* and also by the *"due process"* clause of the *Fifth. U. S. v. L. Cohen Grocery Co.*, supra; *Hamilton v. Kentucky Distilleries,* supra; *Ex parte Milligan,* supra.

Our Constitution provides for a judicial trial where one is accused of sedition or treason but the military here would judge appellant according to its motion of military law and expediency and dispose of the formality of an accusation and trial. Alien belligerants engaged in espionage and sabotage activities caught red-handed and while in flight are granted trials before military tribunals (*U. S. ex rel. Quirin v. Cox, et al.,* decided by this Court on October 29, 1942), or in our Federal Courts. However, where the unexpressed and fictitious charge against a citizen of Japanese stock at most is a mere suspected disloyalty a military commander dispenses with a hearing before a military commission and prevents a judicial trial simply by incarceration induced by the show of bayonets.

Orders usurp judicial powers.

In war or in peace if a *citizen* is charged with the violation of a federal law he is *triable* only by the Federal Courts where the judicial power of the United States resides. Sec. 1, Art. III, *U. S. Constitution.* If a citizen is *charged* with treason he is triable only in the Federal Courts. Cl. 1, Sec. 3, Art. III. Neither

Congress nor the military authority is authorized to interfere with judicial administration or usurp judicial power but the Army has nevertheless interned the appellant.

The Courts are powerless to punish appellant on a mere suspicion or to punish him unless he is guilty of some overt act and had criminal intent at the time. If the judiciary cannot punish a person except on proof of a criminal act accompanied by criminal intent where does the military derive such power? That 73,000 citizens could be punished for crime that has not been committed taxes the imagination and is incredible.

Under authority of General DeWitt approximately 200 *individual* exclusion orders have issued from October, 1942, to date, banning individuals from the military district of the Western Defense Command. With the possibility of a few exceptions these persons so banned were naturalized citizens of prior German or Italian ancestry. It is highly significant to this appeal to note that these suspected persons were given written notice to appear before various Hearing Boards set up by the General under the Wartime Civil Control Administration, a military agency, each board consisting of three army officers. Thereafter administrative hearings in each of these cases were given by these tribunals before the individual banning orders issued. The suspected persons were given the opportunity to be present with counsel in an advisory capacity. Like hearings for the evacuated citizens of Japanese ancestry were never given however. It is

significant that the Attorney General has brought suits to annul the citizenship papers of these naturalized Germans and Italians on the ground of fraud in the procurement thereof. These suits are designed to prove them to be aliens and thereby to demonstrate that their exclusion was justified under the *Alien Enemy Act* and that it was not the result of arbitrary military action. Like reasoning has no application to the native born citizens of Japanese ancestry who are citizens by birth under the 14th Amendment.

Lettres de cachet.

The exclusion orders and the statute which gives them effect are, in reality, penal *lettres de cachet* which, on their faces, suggest they were intended to be applied impartially to citizens and aliens. In operation, however, they have been applied to citizens on a race discrimination basis. To plague American citizens shrewd minds have revived these letters which once occasioned so much suffering to innocent French citizens. It took the French Revolution of 1789 and a decree of the Constituent Assembly of France to abolish them. It is significant that Napoleon Bonaparte, a military man and executive official of megalomaniacal tendencies who became a dictator, thereafter restored them under a plea of *military necessity* in a decree issued on March 9, 1801, on the states prisons. This was one of the chief reasons he was thereafter charged by the *sénatus-consulte* which pronounced his fall on April 3, 1814, with having violated *"the constitutional laws"* of France. The 4th, 5th, 6th and 8th *Amend-*

ments of our federal Constitution were adopted to prevent what such letters occasion.

Banishment is illegal.

The exclusion orders and the statute, as their enforcement machinery, compel the exodus of a people. Compelling a person to quit a *city, place* or *country* for a period of time or for life is *banishment. Exile* is banishment. *Transportation* is a banishment which deprives one of liberty after arrival at the place to which one is asported. *Relegatio* is a banishment in civil law which leaves a few rights of citizenship in a person. *Abjuration of the realm* is a species of banishment under oath never to return unless by permission. See *Black's Law Dictionary* for definitions and supporting citations. A banishment of any of the foregoing types is an *infamous punishment* specifically prohibited by the provisions of the *5th Amendment.* See *U. S. v. Moreland,* 258 U. S. 433, 66 L. Ed. 700. See also the discussion of Justice Brewer in a separate opinion in *U. S. v. Ju Toy,* 198 U. S. 253, 269-270, 49 L. Ed. 1040, stating that banishment is also a *cruel and unusual punishment* prohibited by the *8th Amendment* in addition to the *5th Amendment.* See also, *Ex parte Wilson,* 114 U. S. 417, 428, 29 L. Ed. 89, 93.

There was no justification for the issuance of civilian exclusion orders by the military authorities under which citizens are condemned to banishment simply because of their race. Never, in war or in peace, has such an outrageous invasion of the rights and liberties of American citizens been undertaken in America.

Other rights infringed.

It would seem also that Public Law No. 503 which, by its threat of prosecution for the exercise of lawful rights, gives effect to the exclusion orders under which appellant and thousands of citizens of similar ancestry have been interned in concentration camps, constitutes an infliction of an *infamous punishment* in violation of the *5th Amendment* and of a *"cruel and unusual punishment"* forbidden by the *8th Amendment*. The fine and imprisonment term fixed by the statute for a violation of exclusion orders to be thereafter executed by a different agency of government is also an excessive fine and penalty forbidden thereby.

Public Law No. 503 is designed to punish appellant for a failure to comply with Exclusion Order No. 57 which subjects him to internment in a concentration camp although he is guilty of no wrongdoing. In such a camp he is detained under armed military guard and is subject to restrictive military orders. The condition it imposes upon him is not distinguishable from a condition of slavery and involuntary servitude forbidden by the provisions of the *Thirteenth Amendment*. See *Slaughter-House Cases*, 83 U. S. 36; *Smith v. U. S.*, 157 Fed. 721, cert. denied, 208 U. S. 618, discussing *Civil Rights Statutes*, 18 U. S. C. A., Sec. 51, guaranteeing right to personal liberty.

It cannot be doubted that these discriminatory exclusion orders deprive these American citizens of most of the rights and liberties guaranteed by the Bill of Rights and the Constitution.

In her hours of greatest travail and direst peril England interned alien enemies but did not stoop to interning her own citizens who were of alien enemy ancestry. She refused to deprive them of citizenship rights. See *House Report* No. 2124, page 279 et seq. It was reserved for Nazi Germany and her satellites to penalize their citizens whose ancestors were Jews. It is unbelievable that America desires to imitate the vicious example of her enemies.

What the appellee herein asks of this Court is that it, as the judicial servant of the Republic that is the closest approximation of a true democracy on earth, uphold a statute and military orders discriminating against native born citizens on the basis of racial origin and thereby destroy the Constitution. It is an extraordinary request to say the least.

PROTECTIONAL CAMPS SHOULD HAVE BEEN ESTABLISHED.

Had the evacuation been *invitational* to American citizens of Japanese ancestry and aliens outside the statutory age limits of the Alien Enemy Act, and designed and carried out solely for the *physical protection* of those who were threatened with or who entertained fear of injury from lawless action upon the part of anti-social, irresponsible and criminally bent persons or groups there would be much to commend the action of the military and we would then have seen in operation a democratic state acting true to its political and social concepts. The appropriation of public

moneys and the use of Federal troops for such a purpose is authorized under the "general welfare" and "common defense" clauses of the Constitution. But what has here happened is that the evacuation was not *"invitational"*—it was intentionally compulsory—and accomplished under threat of military force and of punishment under Public Law No. 503. The evacuee citizens have been herded into concentration camps as though they were alien enemies. Detained as prisoners under armed military guard they are deprived of all, or most all, of the privileges of citizens to the everlasting shame of America.

When the Army intruded beyond the *"invitational"* stage it invaded the liberties of American citizens. A majority of its victims cheerfully and with good grace would have accepted an invitation to leave so as not to have been separated from members of their families who were aliens, and the democratic processes we prize and the democratic principles we profess and which are guaranteed by the Constitution would have been preserved. The departure did not evoke an admiration of military virtue. The victims left—inspired by a dread of military displeasure. When Public Law No. 503 and these exclusion orders are declared unconstitutional and void the Army will relax its rule and the concentration camps will be converted into *"protectional"* camps for those who believe they need such protection and democratic government will be reestablished.

Loyalty is not a thing of race but of nationality. It attaches to the country where the individual's economic and political interests lie and to the nation which sustains and protects him. One's loyalty is to the government in which he has participation and which is devoted to his welfare. To distinguish themselves from others a few unhistorical-minded individuals pride themselves on their race and thereby confuse race for nationality. Hence the concept of a white race, the Caucasian, the Aryan of whom the proud but degraded Nazis not long since were wont to brag. The concept is utterly false. Between the extremes of albinism and negroism there are many shades of skin-pigmentation and it would be a person of extraordinary historical retrospect who would dare assert the blood that coursed his veins contained only that traceable to white stock. The sole claim that anyone can make for purity of the blood stream is that it is pure mongrel. The origin of all peoples inhabiting the earth today is clouded with great obscurity. This is true of the so-called whites in Europe and America whose ancestors' coloration varied from white to black. The origin of the Japanese is also clouded in like obscurity, the anthropological guess being they carry the blood of Chinese, Mongol, Malay, Indian, Samoyede, Finn, Hun, Tungu, Ainu and others. Their ancestors' coloration in any event varied from the white Ainu to the black Dravidian. The difference between a person of one stock and that of another lies not so much in superficial skin pigmentation as it does in

environment. Individuals in a similar environment act pretty much alike and their kinship and feelings for their fellow men is based primarily on nationality and intellectuality rather than on false ideas or theories of race, color or creed.

How many of our *whites* can distinguish those of Japanese ancestry from those of Korean, Manchurian, Malayan, Chinese, Tibetan, Samoyede, Hun, Finn, Tungu and Ainu ancestry? How many of them can identify a Japanese or a person of Japanese ancestry or even describe the physical appearance of one? In the United States the word *Japanese* and its contraction *Jap,* when applied to any of our citizens, is an opprobrious epithet as was the word *anarchist* in the nineties, the word *communist* in the twenties and the word *Jew* in modern Germany. There are no Japanese in America except they are aliens. Likewise there are no English, Irish, Scotch, Australians, French, Spanish, Portuguese, Italians, Russians, East Indians, Africans, South Americans or Asiatics here except they are aliens.

All citizens of this country are Americans. The appellant is an American citizen. His nationality is American. These citizens who have been evacuated and interned are nationals of the United States. They are loyal Americans. Neither the government nor any other citizen has the right to deprive them of the rights that inhere in and attach to all citizens. These rights are not dependent upon race, color or creed. They are indestructible.

ORDERS DEGRADE CITIZENSHIP.

Once upon a time, before these military orders issued, this country belonged to its citizens and not to their selected governmental servants. Then each citizen could be said to be a king and none a subject for all were equal in the eyes of the law and there existed no class distinctions. Then he went by the name of citizen which is a name or title of greater dignity and nobility than that of king. The citizens created this nation and established its Constitution. The citizens produce its wealth, fight its wars and determine its peace. No man is entitled to assert greater rights than those of a citizen. Regardless of his race, color and creed or the nationality of his progenitors each citizen is the legal equal of another —none is superior and none is entitled to greater rights, privileges and immunities. He is subordinate to none. He is supreme in America or rather was so until these military exclusion orders issued. These arrogant orders seem devised to supplant democratic government with authoritarianism—they impose military force for ~~judicial~~ *juridical* order. The attaching by them of a suspicion of treasonable intent to a whole segment of our citizenry because of the geographical origin or old nationality of a few of their ancestors is not an exercise of discretion. It is the abuse of discretion. It is incredible that these innocent citizens could so ruthlessly be ground under the military heel and their feeble protests fall upon deaf ears. Does suspicion attach them to but not to alien enemies and other citizens? Are they more capable of subversive activities than others?

INTOLERANCE GLORIFIED.

The First Quarterly Report of the War Relocation Authority, page 26, containing a survey from March 18th to June 30, 1942, shows that approximately one-fourth of the total number of evacuees interned in these concentration camps are children under fifteen years of age. Little children have been seized and interned by executive officials of a Christian government heedless of the Sermon on the Mount to which these professed followers of Jesus render lip service. *"Do unto others as ye would have others do unto you"* and *"Suffer little children to come unto me"* have made little impression upon them. What Jesus preached by word and by example was here ignored. Would He have countenanced the drawing of distinctions between citizens based upon ancestral lines? Would He have drawn a line between children and children? What has come over us that we have made war against little native-born children? Did these innocents commit fault? No guilt was theirs. The guilt lies with those of blunted feelings who committed this wrong against them. The spirit of bigotry and intolerance has been loosed in America by these extraordinary orders. The violent uprooting of these people is the most odious and abominable crime ever committed in America. What can be said for a government which permits 73,000 of its own citizens, young and old, to be treated as a herd of insentient beings, condemns them to internment and reduces them to a state of shameful slavery simply because their ancestors whom they never selected were once nationals of Japan ?

What has here been done was worthy of a brutal Mongol Court of the 13th Century. Certainly it was unworthy of our vaunted democracy and unworthy of our generation. It is not justified by war. A state of war does not justify everything. If it is not war it is national emergency, national salvation, national survival, or reasons of state that is usually offered as the excuse for oppression. What strange excuses can be offered that innocent men and women, boys and girls and little children—all of whom are American citizens—can be uprooted by military force and be imprisoned when they have not been guilty of crime and no disloyalty upon their part has been evidenced? American babies are being born in these prison camps, and kept behind barbed wire while armed guards patrol the area. If they were white babies neither a military commander, the government nor the public would suffer the imprisonment to endure.

War does not excuse license. It neither excuses nor justifies the destruction of the personal liberties and property rights of a segment of our citizenry on a race discrimination basis. We are not at war for war's sake but for the sake of establishing a permanent and just peace. We are at war to liberate all oppressed peoples and to enable them to gain democratic rights. The military exclusion orders and the statute involved herein would kick all the great and noble concepts of freedom and the achievements of 167 years of a people's government into the rubbish heap of abandoned ideals, betrayed promises and forgotten hopes. Every true and loyal American citizen ought

to have raised his voice in great anger and wrath in protest over this terrible wrong so loudly that our government officials would have lent a willing ear and in great trepidation have made haste to right the wrongs committed in the name of the government.

GRIM PARALLELS.

A number of our administrative officials prate of the sanctity of minority rights the while they suffer minorities to be persecuted. While reverencing the form of the Constitution by declaiming pretty phrases in its praise others by their action do dishonor to its substance. What unholy motive impels a few intolerant souls to injure the helpless? Does this arise from delusions of self-importance and personal grandeur? Is this the mode by which they would attain a type of distinction and project their personal ego into the future?

A Machiavelli might grin with pride over what here was done. As Inquisitor General of Spain Tomás de Torquemada exiled one and a half million Jews from Spain for alleged *"reasons of state"*—and, as a result of the removal of those Spanish citizens from Spanish soil, executed by the military forces, Spain ever since has been an impoverished nation and her neighboring States who extended a welcome hand to the exiles were enriched by their presence and industry. The reasons of state professed for the removal was that the Jews were suspected of a lack of *limpieza*,

or racial purity, and heresies. A minority of Spain's citizens was plundered, Spanish industry subsided and Spanish culture declined. Torquemada is held in high esteem by the Nazis. Herr Hitler and his *herrenvolk* plundered, interned and exiled German citizens who, because they had ancestors who were Jews, were deemed disloyal.

Those who were initially responsible may smile in smug satisfaction and prattle of a false military necessity justifying this removal of innocent citizens but a government that makes war on its own citizens in the absence of rebellion is unworthy of the name of government. Military necessity has not caused the removal and internment of the 35,183 aliens and the 124,351 citizens of Japanese ancestry (H.R. 2124, p. 91) from the Hawaiian Islands although those far outposts were for a time the very battleground of this war and martial law had been proclaimed and its rule applied there. Here, in eight Western States, all within the continental limits of the United States, in the absence of martial rule and where, except for possible stray shellings, the safety of the inhabitants is assured by our military and naval might at home and in the far Western Pacific, military necessity cannot be magnified and exaggerated into establishing a fictitious theatre of war to justify the destruction of the civil rights and liberties of a whole segment of our citizenry.

From these exclusion orders it appears they were executed under the presumption that, with few exceptions, the 1,000,000 Axis nationals here and the 11,000,000 native-born of German and Italian stocks are all devoted and loyal to the United States whereas these unfortunates who have been summarily evacuated and interned are disloyal. Obviously no government of a civilized nation interns 1,000,000 foreigners or 11,000.000 persons of alien stocks. It was reserved for us, however, to gather up a small minority of some 43,691 aliens and their 73,673 native-born offspring for internment—the political repercussions are comparatively negligible. What difference does it make to an apathetic government that the latter are citizens and impoverished as the result of this injustice when it can offer the fictitious plea that war is the justification?

If these dictatorial orders are valid each military commander who is ambitious can act as a diminutive feudal Shogun and, with impunity, disregard popular rights and enforce his own temporary brand of tyranny in his allotted military area. *Aut Caesar aut nullus.* All too dangerous to American democracy is the belief that executive officials who are servants of the people are the leaders and that the people are the led. The trend towards "leadership" leads to the idolization of leaders. The cult of leadership results in dictators. The world has had enough of dictators.

Dictatorship does not succeed under its own label. The post-war history of Italy and Germany since

1918 amply proves that it succeeds best under a fictitious label—that it comes under the guise of some sort of necessity, military necessity, national emergency or national salvation—but whatever label it bears the people all too soon feel its liberty crushing effect and find themselves thoroughly regimented and quite helpless. If we are not alive to the dangers presented by this wholesale invasion of the liberties of a minority of American citizens and do not call a halt to it we may be too late to preserve even a semblance of our constitutional form of government. Has America enjoyed the blessings of democracy so little she is willing to welcome dictatorship?

CONCLUSION.

Neither the President, the military authorities nor Congress appear to have been primarily responsible for this uprooting of some 73,000 American citizens. It seems to have been instigated by political pressure groups which used the war as an excuse to accomplish the banishment of these citizens along with alien Japanese. These groups would, if they could, likewise banish all other citizens who are descended from Oriental ancestors. Those upon whose shoulders the blame must finally fall would excuse the suffering they created by asserting these aliens and the ancestors of these citizens ought never to have been admitted here because they cannot be classified as whites and because of a possibility a few among their present ranks might prove subversive. Those who inspired

this malicious and inexcusable wrong may think themselves of heroic proportions but historically they will loom as dwarves. They were actuated by base and selfish motives and not by the noble purposes the Army professes. They sought political preferment, feared the economic competition of their victims and hoped for profit from the exclusion.

Usurpers of power have generally apologized for the tyranny they imposed by asserting their victims were unfit for liberty. Here we discover a novel excuse. A helpless minority of citizens is sacrificed on the pretext it might have subversive members in its ranks who endanger the public safety, a military commander being the sole and arbitrary judge of what the public safety requires to the exclusion of Congress. The victims of conscious cruelty or complete indifference are given no opportunity to prove their innocence, public opinion is offered no chance to express itself on the wisdom thereof and Congress maintains an indiscreet silence. This attaching of hate and a suspicion of disloyalty to citizens because of the accident of their ancestry; this offering up of the innocent and helpless, the honest and loyal, as a sacrifice to a spurious public clamor, artificially created, is not a new phenomenon but a peculiar characteristic of what, for want of a truer term, we deign to call our civilization.

These citizens submissively bent their necks when they saw the yokes their white brothers had fashioned for them and mutely submitted to indignities that never before have been visited upon any group of

citizens during our history. We had nothing to fear from them. Had a genuine fear of them or against any in their ranks been entertained loyalty-hearing boards could have been established to test their loyalty. Had there been any evidentiary basis for such a fear other than bare suspicion and mistrust of them on the part of a few ignorant agitators, cheap politicians seeking notoriety, political pressure groups and uniformed persons loyalty-hearing boards would have been set up. We are not at war against our own citizens. Thousands of these citizens now serve in our military forces in defense of our country, Constitution and Flag. If any fear of these citizens exists in the minds of their fellow citizens it is pure image-making. Do we think their unconscious minds recapitulate their historic racial past? If we do, remember they derive from a peaceful fisher-folk and that it is only in modern Japan, lately feudal, that the arts of war were cultivated on a national scale. Today the hapless people of Japan are held in the grip of a small group of feudal-minded parasitic scoundrels masquerading as war lords in uniform. Their grip is but temporary and will be loosened by our victorious armies and the victims will be released from their chains.

Does history offer a precedent for this terrible injustice? Yes, there is always a precedent for injustice. We need not look back to Attila, Genseric, Genghis Khan and Tamerlane. We find a few recent, conspicuous and frightening precedents. The communists in the Soviet Union, the facisti in Italy, the

nazis in Germany and the militarists in Japan within the past quarter of a century seized the reins of their governments and rode to power over the ashes of civil liberties. Millions were imprisoned and reduced to a state of brutish slavery by them with a cruelty that evokes horror and beggars description. Not long ago we were wont to look askance and view with horror the barbarism displayed. Must America abandon her ideals and emulate these examples? Do we hold the rights and liberties of citizenship so lightly we are willing to surrender them whenever the bugles blow and the war drums beat?

What is it that the appellee actually contends in asking that this shameful action of the military be upheld? Is it not, in essence, that our Courts follow the example of the German Courts during the ascendancy of the Nazis to power? Does it ask this American Court to serve the whims and do the bidding of military commanders and trample upon civil rights and liberties? If so it contends that human liberties are of no consequence, that representative government is a failure and that our citizens were born to be slaves.

Liberty does not mean the power of a minority or of a majority of the people controlled either by an ignorant or prejudiced leadership to suppress the rights and privileges of any of our citizens. The Constitution was designed to protect the rights of the individual and of minorities against predatory action of the part of the government and majorities and to

protect the individual against oppression. If the rights and liberties which are a constitutional heritage and our pride be lost to the appellant and a minority of our citizens herein they are likewise lost to all citizens and a military dictatorship over this nation will be an established fact.

No individual who had a hand in this plot to wreck the lives of these innocent citizens will long be remembered but the injustice of a government that permitted it to occur will forever be enshrined in the hall of infamy as a symbol of bigotry, intolerance and oppression. When the carnage of war is over and the tumult has died down and sanity is recovered what will historians say of this outrageous action? The evil here done will live to be celebrated by universal condemnation. The finger of scorn will be pointed at those who caused it.

We are not yet deprived of all rights and liberties as are the helpless citizens of Germany in Hitler's Third Reich, the unfortunate citizens of Italy in Mussolini's Fascist State and the miserable citizens of Japan in Tojo's transitory Yellow Empire. This is still America, the cradle of Liberty, the home of Democracy and the land of the Free. These exclusion orders and this statute breed and nurture a military dictatorship. We desire neither a dictatorship nor the semblance of one in America. What the military commander herein has wrongfully done in the name of the government and the trial Court has upheld we demand that you undo in the name of the People.

Your mandate will be obeyed for the judgment of this Court is the judgment of the People to whom the military authorities are subordinate and answerable.

Dated, San Francisco, California,
May 7, 1943.

Respectfully submitted,
JACKSON H. RALSTON,
Attorney for Amicus Curiae.

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FILED

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1942

No. 870

GORDON KIYOSHI HIRABAYASHI,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF OF THE STATES OF CALIFORNIA, OREGON AND WASHINGTON AS AMICI CURIAE.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1942

No. 870

GORDON KIYOSHI HIRABAYASHI,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF OF THE STATES OF CALIFORNIA, OREGON AND WASHINGTON AS AMICI CURIAE.

The States of California, Oregon and Washington file this brief as *amici curiae* in support of appellee for the purpose of presenting to this honorable Court their position concerning some of the important questions of fact and law involved upon this appeal.

PRELIMINARY STATEMENT.

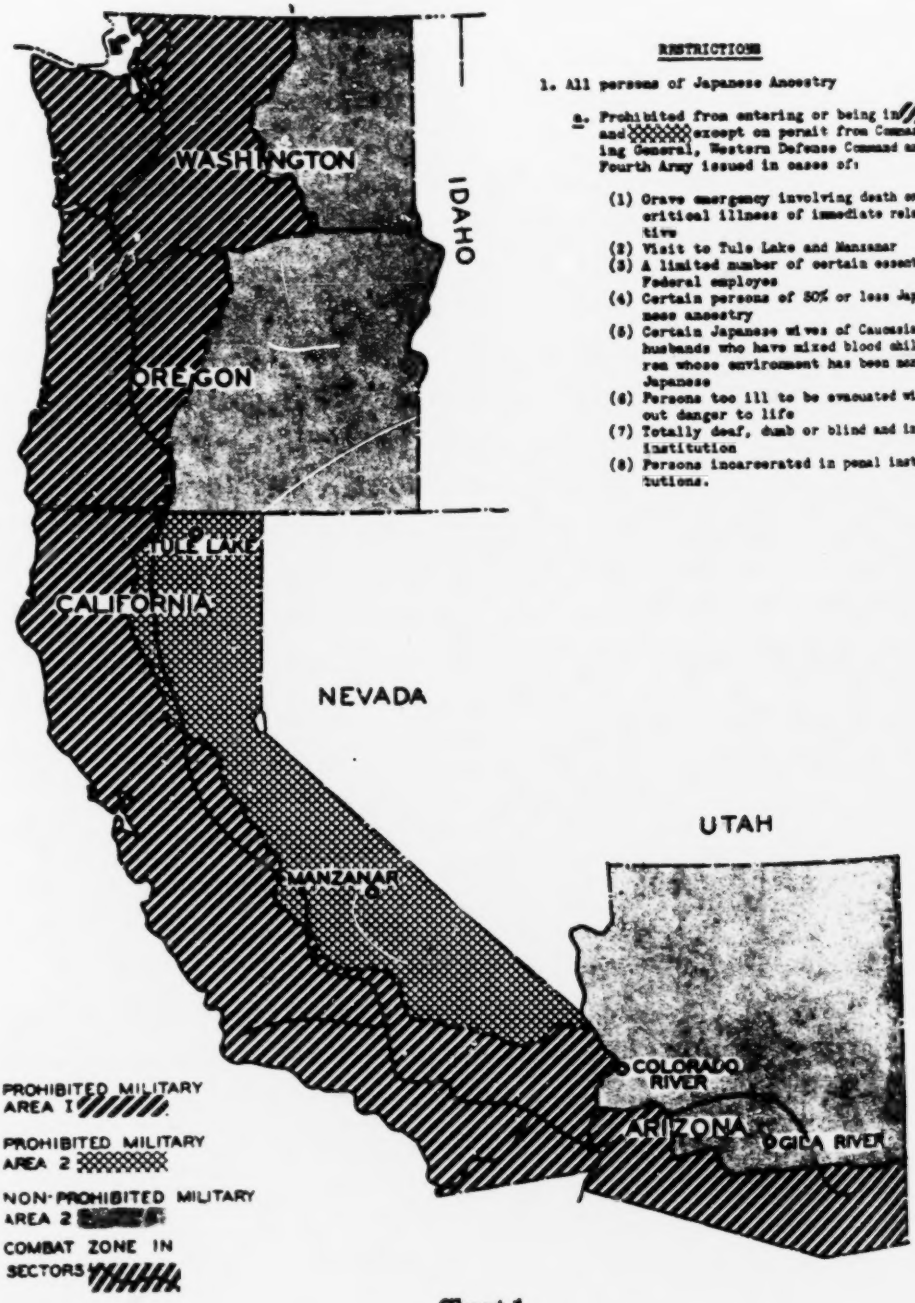
The instant case concerns the validity of the curfew and exclusion orders imposed upon persons of Japanese ancestry residing in Pacific Coast military areas,

by the Commanding General of the Western Defense Command. An appeal was taken to the Ninth Circuit Court of Appeals (No. 10,308) after judgment of conviction in the United States District Court for the Western District of Washington, Northern Division, upon an indictment charging appellant with having violated Public Law 503 (77th Cong., 2nd Sess., Ch. 191; 18 U.S.C. sec. 97A) by virtue of the disobedience of the curfew (Public Proclamation No. 3, 7 Fed. Reg. 2543, March 24, 1942) and evacuation (Civilian Exclusion Order No. 57, May 10, 1942) orders of Lieutenant General J. L. DeWitt, the Commanding General of the Western Defense Command and Fourth Army. The whole matter in controversy now comes before this Court for consideration by order (Tr. 43) made pursuant to Section 239 of the Judicial Code (28 U.S.C. sec. 346).

The defendant, an American citizen of Japanese ancestry, at the time of the said disobedience resided in the City of Seattle, State of Washington. The companion case of *Minoru Yasui v. United States,* No. 871, also before this Court, arises out of a judgment of conviction in the United States District Court for the District of Oregon upon an indictment for violation of Public Law 503 by reason of the disobedience of the said curfew order. Yasui, born at Hood River, Oregon, and a person of Japanese ancestry, resided at the time of the alleged violation in the City of Portland, State of Oregon. The full judicial history of these cases, together with the pertinent statutes, orders and proclamations, appears in the Government's briefs. Other American citizens, persons of

MILITARY AREAS NOS 1 AND 2

WESTERN DEFENSE COMMAND



RESTRICTIONS

1. All persons of Japanese Ancestry

   a. Prohibited from entering or being in [redacted] and [redacted] except on permit from Commanding General, Western Defense Command and Fourth Army issued in cases of:

   (1) Grave emergency involving death or critical illness of immediate relative
   (2) Visit to Tule Lake and Manzanar
   (3) A limited number of certain essential Federal employes
   (4) Certain persons of 50% or less Japanese ancestry
   (5) Certain Japanese wives of Caucasian husbands who have mixed blood children whose environment has been non-Japanese
   (6) Persons too ill to be evacuated without danger to life
   (7) Totally deaf, dumb or blind and in an institution
   (8) Persons incarcerated in penal institutions.

Chart 1.

Japanese ancestry residing in the State of California, have been convicted for violation of the curfew proclamation and similar exclusion orders.[1]

THE INTEREST OF THE STATES OF CALIFORNIA, OREGON AND WASHINGTON.

The States of California, Oregon and Washington face the prospect of the first onslaught upon continental United States by the Imperial Forces of Japan. These Pacific Coast States form the western portion of the Western Defense Command and contain within them Military Areas Nos. 1 and 2 as defined by the Commanding General of the Western Defense Command and Fourth Army. The westernmost boundaries of these States form a Combat Zone one hundred miles wide, extending from the Washington-Canadian border down the Oregon and California coasts and along the California-Mexican border (Chart 1, opposite). A field army occupies the length and breadth of these Pacific Coast States. Over one thousand miles of coastline must be guarded, not only against attack by sea, land and air but also against infiltration by enemy agents. Many strategic naval and army installations and establishments, aircraft factories, shipyards and other war plants, army

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[1] *United States v. Korematsu*, No. 10,248, CCA-9, involves a person of Japanese ancestry residing at San Francisco, California, and raises questions identical with those in the instant and the *Yasui* cases. A question concerning the right of the defendant to take an appeal from the trial court's order therein (U.S.D.C. N.D., Cal., S.D., No. 27635-W) has been certified to this Court and accepted for decision.

training camps, posts and arsenals, vital defense resources and utilities are situated in these States.

Upon the declaration of war immediate action had to be taken for the further defense of the Pacific Coast and for the protection of national defense materials, premises and utilities.[2] 88.5 percent of the Japanese population of the country was concentrated in the States of California, Oregon and Washington.[3] An estimate made of the situation by the Commanding General of the Western Defense Command showed that the Pacific Coast was threatened with invasion by the forces of Japan; that there were over 112,000 persons of Japanese ancestry on the Pacific Coast living near prospective landing beaches and within the vicinity of defense plants, materials, utilities and military installations; that this group was largely unassimilated and that many within it possessed strong ethnic, religious, ideological and family ties with the enemy Japan; that both the time required to examine this large group and the lack of an adequate test and trained personnel made treatment upon an individual basis impossible in the face of the emergency which required prompt action. The preponderance of the problem on the Pacific Coast is illustrated by the accompanying map showing the Japanese population of the United States (Chart 2, opposite). The Commanding General therefore reached

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[2]The mission of the Western Defense Command and Fourth Army is:

1. Defense of the Pacific Coast of the Western Defense Command against attack by sea, land and air;
2. Local protection of establishments and communications vital to the national defense for which adequate defense cannot be provided by local civilian authorities.

[3]1940 U. S. Census (16th).

GEOGRAPHIC DISTRIBUTION JAPANESE POPULATION

UNITED STATES: 1940



NUMBERS INDICATE JAPANESE POPULATION AS REPRESENTED BY ELEVATION OF STATE

Chart 2.

the decision that all persons of Japanese ancestry must be removed as a group from the military areas and that, prior to this being accomplished, all such persons were to observe certain curfew hours.

The States of California, Oregon and Washington believe that this problem within their States, from both a legal and practical viewpoint, should be treated solely as a military matter. The possibility that the exclusion orders might be held invalid and that persons of Japanese ancestry might be permitted to return before a time justified by the military situation is of the deepest concern to these States. The return of these people while the military necessity for their exclusion remains would require the police authorities of the Pacific Coast States to deal with the danger which the military authorities believe the presence of persons of Japanese ancestry presents to the defense of these States and the maintenance of internal security therein. To leave what is essentially a military problem to the civilian authorities for solution unfortunately would tend to confuse the present status of these people with the social and economic questions which have existed with reference to them in these States for many years. Their return against the advice of the military authorities undoubtedly would give rise, under the highly emotional conditions of war intensified by such incidents as the recent execution of captured American flyers, to an unreasoning public reaction. The prospect of public disturbances would be very real.

The cases now before this Court call for a statement of the occasions when military authorities in time of war and within a theater of operations may exercise control over persons, citizens and aliens alike, for the defense of the area against invasion, attack, sabotage, espionage and fifth column activities, and generally to further the prosecution of the war. For example, the Commanding General of the Western Defense Command has issued dim-out proclamations[4] for the purpose of reducing the amount of offshore lighting so that it cannot be used as an aid by enemy submarines in their attack upon coastwise shipping. These orders presumably supersede state lighting laws and are valid although they affect the use of property and restrict freedom of movement. Other measures may have to be undertaken, such as prohibiting public use of beach areas and requiring the evacuation of persons from areas subjected to nemy air attack. A clarification of the authority of the President and his subordinate military commanders to exercise such authority in time of war within a theater of operations, and the right of Congress to provide sanction for the enforcement of these military orders in the civil Courts, will assist local and state authorities in the performance of their duties in connection with the war effort.

Thus the interest of the States of California, Oregon and Washington in the specific and general questions raised here is clear.

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[4]Proclamations Nos. 10 (August 5, 1942, 7 Fed. Reg. 6631) and 12 (October 10, 1942, 7 Fed. Reg. 8377)—control of lighting within restricted zones, Washington, Oregon and California.

THE ESSENTIAL QUESTION.

In time of war, may a military commander in a military area within the United States exercise certain controls over civilians and civilian authorities for the purpose of defending the area against attack and threatened invasion or preventing sabotage, espionage or other acts endangering the prosecution of the War?

THE ARGUMENT.

The facts bearing upon the military necessity for excluding all persons of Japanese ancestry from Pacific Coast military areas and imposing curfew are made a part of the argument, for once the factual background out of which these orders were made is understood the applicable legal principles will be self-evident.

In *Sterling v. Constantin*, 287 U.S. 378 (1932), this Court said, in speaking of the scope of military authority over civilians in the United States:

> " * * * there is a permitted range of honest judgment as to the measures to be taken in meeting force with force, in suppressing violence and restoring order, for without such liberty to take immediate decisions, the power itself would be useless. Such measures, conceived in good faith, in the face of the emergency and directly related to the quelling of the disorder or the prevention of its continuance, fall within the discretion of the Executive in the exercise of his authority to maintain peace." (p. 399.)

Keeping this test in mind, it is believed that agreement can be reached that the military situation on the Pacific Coast with reference to the concentration and characteristics of the Japanese population presented a dangerous threat to the internal security of the area and the successful prosecution of the war and that the measures taken by the President and the Commanding General were conceived in good faith and were directly related to preventing the danger.

To judge the emergency which confronted the President and the necessity for the measures taken to meet it, consideration will have to be given to the military, political, social and psychological conditions on the Pacific Coast. In doing this the Court may take notice of many of the facts to be stated because they are generally notorious and are public events which are part of the history of the times[5] or are matters of public concern upon which the Court may inform itself by reference to documentary evidence or any other reliable source.[6]

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[5] *Daniels v. Tearney*, 102 U.S. 415, 419;
Clark v. U. S., 99 U.S. 493, 495;
Wigmore, Evd. (3d ed. 1940 sec. 2567a);
Jones, Evd. (2d ed. 1908 page 105).

[6] The courts will take judicial knowledge of matters of public concern although calculations and inquiries on the subject may be necessary. *Hoyt v. Russell*, 117 U.S. 401, 404.

In ascertaining matters of fact or of law to be judicially noticed, the court may resort to, or obtain information from, any source of knowledge which it feels would be helpful. *Greeson v. Imperial Irr. Dist.* (C.C.A.-9, 1932), 59 F. (2d) 529, 530.

The court may resort to any means it deems safe to refresh its memory. *Brown v. Piper*, 91 U.S. 37.

I. THE MILITARY SITUATION ON THE PACIFIC COAST.

On the occasion of the treacherous attack by the Japanese upon Pearl Harbor on December 7, 1941, and upon the declaration of war on the following day (55 Stats. 795, 77th Cong., 2nd Sess., c. 561), the Pacific Coast was in danger of attack by land, sea and air. The bulk of our Pacific Fleet lay helpless at Pearl Harbor. The sudden onslaught, while the Japanese ambassadors were talking peace in Washington, found this country during the first months of the war unable to act offensively. The trained and prepared enemy rapidly added to its gains while this country hastily improved its defenses and began to dispatch the first of its forces. Because of the relatively light naval and air forces opposing the enemy in the Far East, there was an ever present danger that the Pacific Coast might be subjected to a major attack and possibly an invasion. The military measures taken to meet the possibility must be viewed in the light of the situation which then existed. On December 11, 1941, the Western Defense Command, combining the eight western States and the Territory of Alaska, was actuated by the War Department and designated as a "theater of operations".[7]

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[7]Field Order No. 1, December 14, 1941.

1. The theater of war comprises those areas of land, sea and air which are, or may become, directly involved in the conduct of the war.

2. A theater of operations is an area of the theater of war necessary for military operation and the administration and supply incident to military operation. The War Department designated one or more theaters of operation.

3. A combat zone comprises that part of a theater of operations required for the active operation of the combatant forces fighting. (*Field Service Regulations—Operations, War Department, May 22, 1941.* Wartime Bulletin PM100-5.)

A combat zone was established by the Commanding General. (See Chart 1, opp. p. 3.) For the first seven months little occurred to reduce the fear of attack. On February 23, 1942, oil installations in the vicinity of Santa Barbara, California, were shelled by a Japanese submarine. On September 9, 1942, a submarine-based plane dropped incendiary bombs in the vicinity of Brookings (Mount Emily), Oregon. The radio station at Estevan, Vancouver Island, B.C., was shelled by a submarine at midnight on June 19, 1942. A few days later, an enemy submarine surfaced and shelled shore batteries at Astoria, Oregon. On June 3, 1942, Dutch Harbor, Alaska, was attacked by carrier-based planes. On June 7, 1942, the Japanese invaded continental North America by occupying the Islands of Attu and Kiska in the Aleutian group. There was an increasing indication that the enemy had knowledge of our patrols and naval dispositions, for ships leaving west coast ports were being intercepted and attacked regularly by enemy submarines.

This summary makes clear that during this perilous period the Pacific Coast was in danger of additional attacks and possibly invasion. As late as December, 1942, the Ninth Circuit Court of Appeals, referring to the attack on the Hawaiian Islands, declared, in *Zimmerman v. Walker,* 132 Fed. (2d) 442:

> "The courts judicially know that the whole Pacific Area of the United States has continued in a state of the gravest emergency; and that the imminent threat of a resumption of the invasion persisted." (p. 445.)

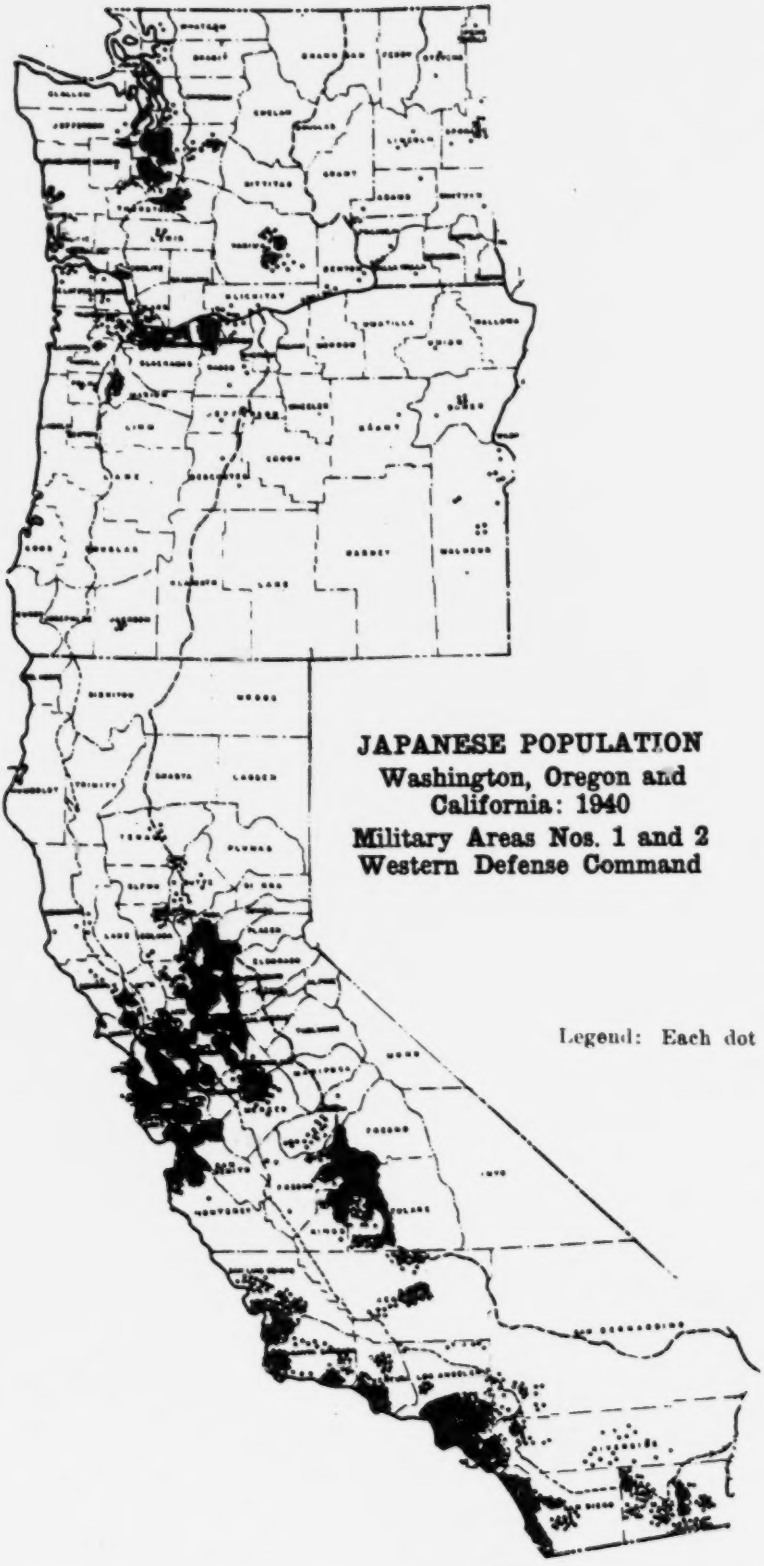

JAPANESE POPULATION
Washington, Oregon and
California: 1940
Military Areas Nos. 1 and 2
Western Defense Command
Legend: Each dot represents ten people

Chart 3.

And speaking with reference to the facts involved in the present case, it was said:

> "So far as concerns the imminence of danger of Japanese attack on the Pacific Coast, this court would be compelled to find that General DeWitt has a rational ground to expect it." (*United States v. Hirabayashi* (CCA-9), No. 10,308; Denman, C.J., dissenting from Certification of Questions to the Supreme Court, p. 13.)

The significance of the concentration and characteristics of the Japanese population within the States of the Pacific Coast must be appraised in the light of this military situation.

II. THE CHARACTERISTICS OF THE JAPANESE POPULATION WITHIN PACIFIC COAST MILITARY AREAS.

Prior to their exclusion, 88.5 percent of all persons of Japanese ancestry in the United States resided in the Pacific Coast States: 93,717 in California, 14,565 in Washington, and 4071 in Oregon—nearly all living within the coastal area designated as Military Area No. 1. (Chart 3, opp.) The Japanese of the Pacific Coast area on the whole have remained a group apart and inscrutable to their neighbors. They represent an unassimilated, homogenous element[8] which in varying degrees is closely related through ties of race, language, religion, custom and ideology to the Japanese Empire.

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[8] *Farrington v. Tokushige*, 11 Fed. (2d) 710 (CCA-9, 1926):

> "It is a matter of common knowledge that the Japanese do not readily assimilate with other races, and especially with the white race." (p. 714.)

It has been the policy of the Japanese Government to maintain these ties with the Japanese in this country.

A. Japanese Nationalistic Organizations of the Pacific Coast.

These activities were carried on through numerous Japanese organizations sponsored or receiving support from Japan.[9] Former Attorney General Earl Warren of California, and now Governor, stated before the Tolan Committee:[10]

> "An additional factor in the danger and one which would probably not be apparent to persons unfamiliar with the California Japanese lies in the fact that the Japanese in this State are very closely organized. There are a large number of Japanese organizations covering every branch of life. There are Japanese agricultural, commercial, educational, social, religious, and patriotic associations in every Japanese community. Almost every Japanese in the State is included in one or more of these organizations.
>
> * * * * * * *
>
> "However, the inter-relationship of the many Japanese associations and their control over the Japanese population of the State has been a matter of general knowledge and has been apparent from items appearing in the Japanese newspapers. These Japanese newspaper items also show that in the past years there has been a close

[9]An account of the work of these organizations appears in a book compiled and partly paid for by American Japanese. It was published in Japan in 1940, printed in Japanese, and entitled "Zaibei Nippon Zin Shi"—"History of the Japanese in America".

[10]Hearings and Reports of House Select Committee Investigating National Defense Migration on Problems of Evacuation of Enemy Aliens and others from Prohibited Military Zones, hereafter referred to as the Tolan Committee. (Part 29, San Francisco, p. 10974.)

relationship between Japanese associations in California and parent or governmental organizations in Japan and that on many occasions the associations in California have contributed to and assisted in the war effort of the Japanese Government.

"While we have no complete information as to the number of Japanese organizations existing in California, Japanese sources indicate that the number is large. Thus the public press carried an item from Tokyo April 25, 1941, to the effect that the Japanese 'Central Council of Overseas Organizations announced that there are 2,700 Japanese organizations in the United States, representatives of which will meet for a convention in Tokyo in November 1941.'

* * * * * * *

"That the Japanese associations as organizations have in the past supported and aided the military campaigns of the Japanese Government is beyond doubt. The contributions of these associations toward the Japanese war effort have been freely published in Japanese papers throughout California.[10a]

[10a] Some of these newspaper items are as follows:

"March 13, 1941.—Thirty-two bales of tinfoil were shipped to Japan through the Japanese consulate general and were contributed by Japanese associations of Fresno County, Kern County, Delano, and San Bernardino.

"July 6, 1941.—Central California Japanese Association announces the collection and transmission to the War Ministry of the sum of $3,542.05.

"March 6, 1938.—G. Yoshida, San Francisco Japanese Association, yesterday sent 400 pounds of tinfoil, making a record total of 2,800 pounds of tinfoil which he has collected, according to the records of the consul general's office."

The Japanese Veterans Association was similarly engaged:

"March 20, 1941.—It is announced that the War Veterans Associations in Japan, Germany, and Italy, in keeping with the spirit of the Axis Treaty, have formed joint and advisory com-

"At one time it is said the association [Japanese Veterans Association of America] numbered 8,000 members and at the meeting at which dissolution was decided upon some 300 representatives were present.

* * * * * * *

"This organization sponsored the tour of Maj. G. Tanaka, of the Japanese Army, and a member of the army general staff, who arrived in San Francisco January 1, 1941, with full uniform, sword, and medals and toured the State lecturing before various Japanese groups, eventually returning to Japan via New York. While here, he is reported to have said: 'Japan and the United States will go to war this autumn.' " (pp. 10,974-10,976.)[10b]

Over 124 separate Japanese organizations along the Pacific Coast were engaged, in varying degrees, in common pro-Japanese purposes, with local branches of these parent organizations numbering more than 310. There were 100 fascistic or militaristic organizations in Japan having some relation, either direct or indirect, with Japanese organizations or individuals in the United States. Many had branch organizations in the United States and directed the activities of these branches. A line of control existed from the Japanese Government.[11]

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mittees to aid and establish the new world order. There are 3½ million veterans and reservists, headed by General Imei, who have pledged their cooperation to Axis aims."

"July 6, 1941. The Japanese Veterans Association of America, in its sixty-sixth meeting, reported the collection of $5,968.60, making a total of 829,440.34 yen collected and transmitted to Japan for use of the military services * * *"

[10b]See footnote 10 supra.

[11]The Court will take judicial notice of the Japanization program in the United States. (See *Akira Ono v. United States*, 267 Fed. 359, 362 (1920).)

The Hokubei Butoku Kai or Military Virtue Society of North America had headquarters in the town of Alvarado, California, and a branch office in Tokyo. Its purpose was to instill the Japanese code of Bushido among the Japanese throughout North America. Another militaristic organization was the Heimusha Kai, the purpose of which was furthering the Japanese war effort. Its prospectus read as follows:

"The world should realize that our military action in China is based upon the significant fact that we are forced to fight under realistic circumstances. As a matter of historical fact, whenever the Japanese government begins a military campaign, we, Japanese, must be united and everyone of us must do his part.

"As far as our patriotism is concerned, the world knows that we are superior to any other nation. However, as long as we are staying on foreign soil, what can we do for our mother country? All our courageous fighters are fighting at the front today, forgetting their parents, wives and children in their homes! It is beyond our imagination, the manner in which our imperial soldiers are sacrificing their lives at the front line, bomb after bomb, deaths after deaths! Whenever we read and hear this sad news, who can keep from crying in sympathy? Therefore, we, the Japanese in the United States, have been contributing a huge amount of money for war relief funds and numerous comforting bags for our imperial soldiers.

"Today, we, Japanese in the United States, who are not able to sacrifice our lives for our National cause are now firmly resolved to stand by to settle the present war as early as possible. 'We are

> proud to say that our daily happy life in America is dependent upon the protective power of Great Japan.' We are facing a critical emergency, and we will take strong action as planned. We do hope and beg you all to cooperate with us for our National Cause."[12]

A militant Japanese organization composed of Japanese ex-service men was known as the Kanjo Kai and was formed to support military action taken by the Japanese Government in the Orient. The following telegram from the Japanese Army Department was received by this group following upon the organization of the society, and was read at the first executive board meeting:

> "During this emergency, you officials are doing your utmost for the Country and the Army Department is very grateful. For the establishment of peace in the Orient, it is necessary for us to adopt positive steps in China."[13]

Monthly contributions of one dollar or more were made to the Imperial Japanese Army War Relief Fund.

The Japanese Association of America (Nipponjin Kai) was the principal liaison between the Japanese organizations in the United States and the Japanese

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[12]*The New World Sun*, August 28, 1937, page 4, columns 6 and 10. (Japanese language newspaper published at San Francisco, California.)

[13]*New World Sun*, July 18, 1937, page 3, column 1.

Government. Maintaining close cooperation with the Consulate, it carried out the directives of that office.[14]

There were many other organizations which, by their names, indicate that their main purpose was the furthering and supporting of the nationalistic program of Japan.[15]

> "The significance of these integrated Japanese associations lies in the fact that through them it is possible for those at the head to exercise con-

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[14]Article 3 of its by-laws provides:

"This association is organized by the local Japanese association under the jurisdiction of the Japanese consulate general of San Francisco." (Tolan Committee Hearings, Part 29, Warren, p. 10976.)

[15]The translation of the names of these organizations is indicative of their objects:

Kaigun Kyokai (Navy Association);
Aikoku Fujin Kai (Patriotic Women's Society);
Jugo Sekissei Kai (Behind the Gun Society or Red Heart Society);
Hokoku Kai (Society for Service to the Country);
Aikokuki Kenno Kisei Domei (Patriotic League for Contribution to the Airplane Fund);
Jugo Kai (Behind the Gun Society);
Ko-A-Sokushin Kai (Society for the Promotion of Asiatic Co-Prosperity);
Kokuryu Kai (Black Dragon Society);
Kibei Shimin Kai (Kibei Society);
Hokyoku Kai (Rising Sun Society);
Zaibei Nipponjin Kai (Japanese Association of America);
Zaibei Nipponjin Kai Renraku Nikkai Kanji Kai (United Councilors' Convention for Japanese Associations in North America);
Nanka Teikoku Gunjin Dan (Japanese Imperial Army Men's Corps of Southern California);
Jugo Haibutsu Riyodan (Behind the Gun Waste Utilication Society);
Josho Kai (Ever Victorious or Invincible Society);
Hinode Kai (Imperial Japanese Reservists);
Hokubei Zaigo Shokuin Dan (North American Reserve Officers' Association);
Sokoku Kai (Fatherland Society);
Suiko Kai (Los Angeles Reserve Officers' Association);
Zaibei Ikuei Kai (Society of Educating the Second Generation in America);

—Japanese Directory of Political and Religious Organizations.

trol over the conduct of other Japanese throughout the State. * * * With integrated organizations such as these exercising such complete control over the conduct of all Japanese in the State, it is quite evident that it would be extremely easy for those at the top to direct the Japanese throughout the State and wherever located in a widespread simultaneous campaign of sabotage which could carry the most serious consequences." (Tolan Committee Hearings, Part 29, Warren, p. 10980.)

B. Indoctrination of American Japanese in Japan.

For over twenty-five years children of alien Japanese have been sent to Japan by their parents for education.[16] Upon their return they were known as "Kibei". These young American Japanese were thoroughly indoctrinated with the Japanese nationalistic philosophy.[17] Of the Kibei in Hawaii, Andrew

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[16]The Court will take judicial notice of this fact. See *Chun Kock Quon v. Proctor*, 92 F. .. (2d) 326, 330.

"Many of them returned to Japan with their family at a young age and returned to America in their late teens." Testimony of Henry Tani, Executive Secretary, Japanese-American Citizens League. (Tolan Committee Hearings, Part 29, p. 11150.)

[17]Joseph C. Grew, *Report from Tokyo*, Simon & Schuster, N.Y., 1942:

"In Japan the training of youth for war is not simply military training. It is shaping—a warping, if you will—of the mind of youth from the earliest years. Every Japanese school child on national holidays goes to his school and takes part in a ritual intended to impress on him his duties to the state and to the Emperor. Several times each year every child is taken with the rest of his schoolmates to a place where the spirits of dead soldiers are enshrined. The military aspect of the state is, and has been for many years, stressed above all other functions of government. Of the state's duty to the individual, or of the individual rights and liberties, the Japanese youth hears nothing. Of his obligation to serve the state, especially through military service, he hears every day." (p. 51.)

W. Lind, Professor of Sociology at the University of Hawaii, says:

> "Finally, there is the rather large Kibei group of the second generation who, although citizens of the United States by virtue of birth within the Territory, are frequently more fanatically Japanese in their disposition than their own parents. Many of these individuals have returned from Japan so recently as to be unable to speak the English language and some are unquestionably disappointed by the lack of appreciation manifested for their Japanese education."[18]

At one time it was estimated that there were about 50,000 American-born Japanese in Japan. The Kibei Shimin movement, sponsored by the Japanese Association of America, was organized to encourage their return to America. It appears that this campaign was successful in securing the return of a large number of American-born Japanese.[19]

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[18]American Council Paper No. 5, page 187, American Council, Institute of Pacific Relations, 129 East 52nd Street, New York.

[19]Tolan Committee Hearings, Part 29, Warren, p. 10978. The Hawaiian (Honolulu) Sentinel, Jan. 27, 1938, reported the special representative of this movement, Shiro Fukicka, General Secretary of the Los Angeles Japanese Chamber of Commerce, as saying:

> "There are roughly about 20,000 American-born youths between the ages of 18 and 25 residing now in Japan. Being high school graduates, they are well versed with the conditions and things of Japanese and would make ideal immigrants to North America." (*Un-American Activities in California*, Report of Joint Fact-Finding Committee on Un-American Activities in California to California Legislature, 1943.)

During 1941 alone, 1573 Kibei entered west coast ports from Japan, and 1147 Issei, or alien Japanese, reentered the United States from Japan. The 557 male Japanese less than twenty-five

Speaking of the American-born Japanese educated in Japan, Governor Earl Warren, then Attorney General of California, after a survey by the law enforcement officers of the State, said in his testimony before the Tolan Committee:

> "I want to say that the consensus of opinion among the law-enforcement officers of this State is that there is more potential danger among the group of Japanese who are born in this country than from the alien Japanese who were born in Japan. * * * There has been practically no migration to this country since 1924. But in some instances the children of those people have been sent to Japan for their education, either in whole or in part, and while they are over there they are indoctrinated with the idea of Japanese imperialism. They receive their religious instruction which ties up their religion with their Emperor, and they come back here imbued with the ideas and the policies of Imperial Japan."[20]

C. Significance of the Issei.

Approximately two-thirds of the persons of Japanese ancestry residing in the Pacific Coast States are native born citizens (Nisei) and one-third are aliens (Issei) ineligible for citizenship.[20a] (*Ozawa v. United*

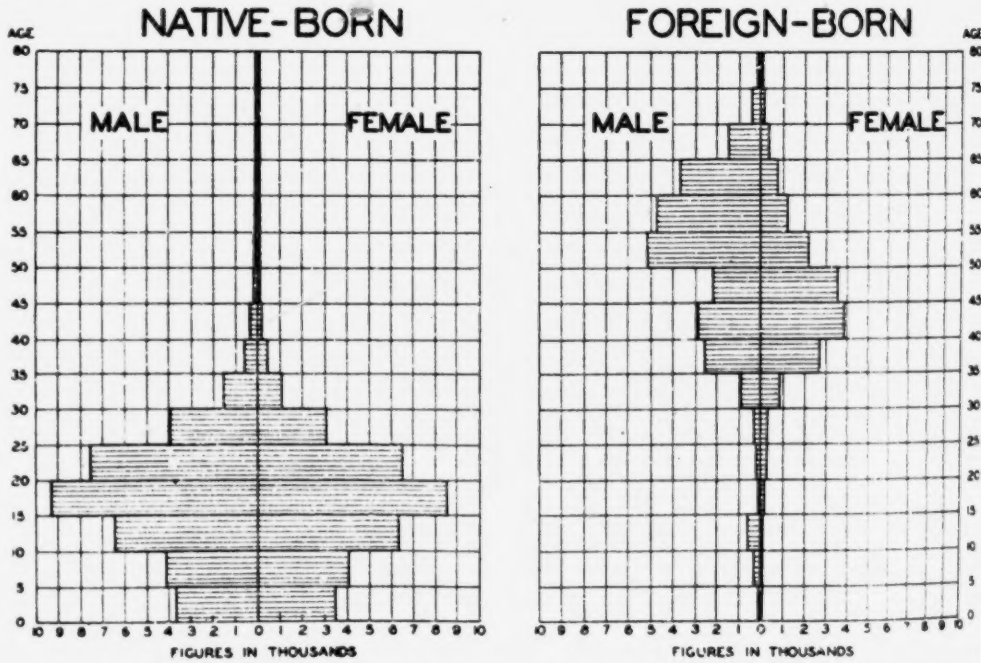
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years of age who entered west coast ports from Japan during 1941 had an average age of 18.2 years and had spent an average of 5.2 years in Japan. Of these, 239 had spent more than three years there. This latter group had spent an average of 10.2 years in Japan. Of the returning Japanese, more than 50% had a close relative in Japan.—Derived from Ships' Manifests filed at the San Francisco, Seattle and Los Angeles Port Offices of the Federal Immigration and Naturalization Service, Department of Justice.

[20]Tolan Committee hearings, Part 29, San Francisco, p. 11014.

[20a]1940 Census of the United States (16th), Population, 2nd Series (Department of Commerce, pp. 50, 52, 61).

AGE AND SEX COMPOSITION OF THE PACIFIC COAST JAPANESE POPULATION: 1940



@ -- FOR THE STATES OF WASHINGTON, OREGON, CALIFORNIA, AND ARIZONA.
SOURCE: UNITED STATES BUREAU OF THE CENSUS.

Chart 4.

States, 260 U. S. 178 (1922).) However, in considering this fact for the purpose of evaluating the reasonableness of the group evacuation, these figures do not present the true significance of the relationship of the Japanese aliens to American-born Japanese.

Because of the late date of Japanese entrance into this country and the exclusion of Japanese immigration in 1924,[20b] the foreign-born Japanese represent the bulk of the adult Japanase population on the Pacific Coast. This situation is graphically presented in Chart No. 4, opposite. Thus it appears that the foreign-born Japanese are almost entirely enemy aliens and that the citizens of the group are peculiarly subject to their influence. The median age of the native born is 17½ years, while that of the foreign-born is 50 years. 90% of the 71,484 native-born Japanese in the Pacific Coast States are under the age of 28 years. 49,186 are under the age of 21 years.[20c] This breakdown of the age groups shows that the evacuation in most cases had to be accomplished with refer-

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[20b]Immigration Law of 1924, 8 U.S.C. 213. The feeling of separateness and implied racial inferiority engendered by this Act was one of the factors to be judicially noted in deciding the instant case, according to Denman, C. J.:

> "These facts are entitled to be considered with reference to the likelihood of disaffection among a class so treated, in determining General DeWitt's regulations for exclusion of dangerous people from the war areas bordering the Pacific. • • • Neither General DeWitt nor this court is concerned with the political or social justification of this stigma on the Mongolian, but both are concerned with its effect on proud spirited people so branded by the Congress."
> —Upon Certification of Questions to this Court, *United States v. Hirabayashi* (CCA-9, No. 10,308), p. 28.

[20c]Unpublished information furnished by Census Bureau of United States.

ence to family groups rather than upon an individual basis.

The enforced alienage of the Issei has caused them to retain a close relationship with the Japanese Government through the consulates. Because of their mature years and their control of the wealth of the Japanese communities, they control Japanese business establishments and agricultural groups[20d] and dominate the many Japanese organizations (supra, p. 12).[20e] The parent-child relationship which exists between the Japanese aliens and the native born is particularly significant because great importance is given to filial obligations in Japanese family life.[20f]

D. Japanese Language Schools.

An additional pro-Japanese influence among American-born Japanese were the Japanese language schools on the Pacific Coast. To assist in the Japanization of the second generation, the Zaibei Ikeui Kai (So-

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[20d]Tolan Committee Preliminary Report, p. 302.

[20e]Statement of Togo Tanaka, Editor of English Section of Rafu Shimpo, Japanese daily newspaper published in Los Angeles, California.—Report of California Legislative Committee on Un-American Activities in California, 1943. Mr. Tanaka stated that: "The older generation, or pro-Japanese group, influenced the thinking of the younger Nissei generation on the matter of the Sino-Japanese war. This accounted for the Nissei's activity in propagandizing the Japanese cause against China. The Issei influence was very strong in this connection. The Nissei had been taught that the Japanese were embarking on a great military crusade in China and building a new order in the Far East." Tanaka believed that the Nissei had been drawn into this ideological position because of emotional ties and that the younger generation of American-born Japanese found it impossible to become objective in face of their parents' prejudice.—Report, pp. 333-334.

[20f]The Court will take judicial notice of social and economic conditions. *Edwards v. California*, 314 U. S. 160, 173 (1941).

ciety for Education of the Second Generation in America) was organized in April, 1940, less than two years before the attack on Pearl Harbor. The purposes of this organization were stated as follows:

> "With the grace of the Emperor, the Zaibei Ikeui Kai is being organized in commemoration of the 2,600th Anniversary of the Founding of the Japanese Empire to Japanize the second and third generations in this country for the accomplishment of establishing a greater Asia in the future * * *."[21]

In California alone there were 248 of these schools, with a total student body of 17,800 and an aggregate faculty of 454.[22] Apparently the text books used were edited by the Department of Education of the Japanese Imperial Government.

The purpose of *The Buddhist Japanese Language School* is to teach not only the Japanese language, *but also to indoctrinate Japanese spirit* as well as Buddhism. This school was founded April 19, 1903. There were about 35 Buddhist language schools and 4900 pupils. Some of the graduates of these language schools were selected to go to Japan and study Japanese education.[22a]

The *Hokubei Butoku Kai* (*Military Virtue Society in North America*) was founded on September 27, 1929. Since that time, this Society has spread all

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[21]*New World Sun*, April 13, 1940, page 4, column 1.

[22]Zaibei Nippon Zin Shi, *History of the Japanese in America*, Pt. II, Ch. 6, p. 483. (Published in Tokyo in Japanese, 1940. Translation.)

[22a]Ibid., Part II, Chap. 5, p. 422.

over the West Coast. In 1940, it had 41 branches and more than 10,000 members. Since 1932, this Society has opened summer schools for military virtue and organized second generation Mother Country Militia Training Corps. This Corps selected 14 members and sent them to Japan for their education. Since then, every year Mother Country Visiting Militia Training Corps have been sent to Japan and in an endeavor to absorb Japanese culture.[22b]

E. Dual Citizenship.

The theory of the Japanese Government that persons of Japanese ancestry, although born in America, may also possess Japanese citizenship has been a barrier to the Americanization of the Japanese.[23] As pointed out in the Report of the Tolan Committee:

> "Two barriers to Americanization of the Japanese have long existed: First, the E lusion Act by which the alien parents were denied citizenship; and second, the dual citizenship of Japanese born in the United States or its Territories and possessions. The former barrier has thrown the alien back upon the Japanese Government, through the operations of the consulates. *This relationship has been reenforced by the presence*

[22b]Ibid., Part II, Chap. 8, p. 564.

[23]It is estimated that 32 per cent of the Nisei—second generation—born in America hold Japanese citizenship, but this figure includes those who are not certain if they have this status. Statement by executive secretary, S. F. chapter of Japanese-American Citizen League, Tolan Committee Hearings, p. 11151.

Act XX-2 of the Japanese Nationality Law of 1924 requires a declaration of intention to retain Japanese nationality for persons born after 1924. A person born prior to 1924 may relinquish Japanese nationality. See Imperial Ord. No. 261, Act III and Ord. No. 262.

on the west coast of large numbers of mercantile establishments and banks tying the commercial groups in the Japanese-American community to Japan. This in turn has led to the practice of sending children to Japan to be educated in preparation for trade and banking. Thus, the leadership of the business community has fallen to those in close touch with the homeland and to their children whose education and commercial position has directed them toward the maintenance of dual citizenship. Communities of Japanese farmers have been more free of these influences, but the need to secure financing of their crops has combined with strong peasant ties of language and kinship to keep these rural people in touch with Japan."[24] *

F. Emperor Worship—Shintoism.

The fact that a number of American citizens of Japanese ancestry participate in the worship of the Emperor of Japan must also be considered in judging loyalties. This worship, known as the cult of Shinto, looks upon the Emperor of Japan and his ancestors as deities and thus joins, in one, political and religious loyalty. The aims and purposes of the State of Japan become the faith of the adherents of Shinto.[25] While there is an indication that Shintoism is not so widely practiced among second generation American Japanese as among their alien parents, the younger generation participate in the rites of Em-

[24]Preliminary Report and Recommendations. These recommendations were approved in the Final Report of the Committee (H.R. No. 2124, 77th Cong., 2nd Sess., May 1942, p. 11).

*Except as hereinafter indicated, emphasis is added.

[25]D. C. Holton, The National Faith of Japan (1938).

peror worship as an expression of national spirit and racial solidarity.[26]

G. The Prospect of a Fifth Column.

The facts just reviewed indicate that because of the racial, cultural, religious and ideological ties and sympathies with Japan and the various causes which have kept the Japanese apart, there would be a sufficient number that could be used as a fifth column in assisting in sabotage or espionage or giving aid in the event of an attempted attack.[26a] Recent history shows that the Japanese made use of military information gathered by Japanese living in the Hawaiian

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[26]For example, on February 11, 1940, the Japanese Association of Sacramento sponsored an Emperor worshipping ceremony in commemoration of the 2600th anniversary of the founding of Japan. 3000 attended.

Another group met on January 1, 1941, at Lindsay, California, to honor the 2601st year of the founding of the Japanese Empire, participated in the annual reverence to the Emperor, and bowed their heads toward Japan in order to indicate that they would be "• • • ready to respond to the call of the mother country with one mind. Japan is fighting to carry out our program of Greater Asiatic co-prosperity. Our fellow Japanese countrymen must be of one spirit and should endeavor to unite our Japanese societies in this country • • •." The program was as follows:

a. Singing of Japanese National Anthem.
b. Opening of the Emperor's portrait.
c. Reading of the Emperor's Rescript.
d. Reading of Message of Reverence.
e. Bowing heads toward Japan.
f. Shouting "Banzai" (Long Live the Emperor).

(*New World Sun*, January 7, 1941, page 5, column 6.)

[26a]The fact that the Hawaiian Islands "because of their position and the inclusion in their population of so large an element presumptively alien in sympathy are peculiarly exposed to fifth column activities" was judicially noticed in *Zimmerman v. Walker*, 132 Fed. (2d) 442, 446 (1943).

Islands,[27] Malaya, the Philippines, Burma and the Netherlands East Indies.

That the Japanese on the Pacific Coast, citizen and alien, are recognized by the Japanese Government as potential agents to assist the Japanese army, navy and air force is revealed in the unabridged translation of the book "The Three Power Alliance and a United States-Japanese War",[28] published in 1940 in Tokyo by Kinoaki Matsuo, an officer in the Japanese Naval Intelligence. Speaking of the expected use to be made of Japanese in aid of an invasion of Southern California, Matsuo says:

> "The climate being ideal, San Pedro is an exceptionally good harbor; there are many Japanese subjects in that area engaged in fishery." (p. 143.)

And of the Japanese in Hawaii, he writes:

> "* * * If a false step is made it might give rise to a regrettable incident such as a great massacre * * * but they will be of great help when a landing is made by our army. * * *" (p. 296.)

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[27]Report of the Commission appointed by the President of the United States to investigate and report the facts relating to the attack made by Japanese armed forces upon Pearl Harbor. Justice Robert's Report, pages 12-13, Sen. Doc. No. 159; 77th Cong. 2nd Sess.

The use of the fifth column technique in modern warfare may be judicially noticed. (*Ex parte Liebmann* (1916), 1 K.B. 268, 274-5, 278.)

[28]*The Three Power Alliance and a United States-Japanese War*, Kinoaki Matsuo (1940); translation by Kilsoo K. Haan, *How Japan Plans to Win*, Little-Brown & Co., Boston (1942).

H. Danger of Sabotage.

Within the Pacific Coast areas in which persons of Japanese ancestry were concentrated there are numerous military and naval establishments as well as public utilities, shipyards, airplane factories and thousands of other industries essential to the war effort. One-third of the nation's war planes and one-fourth of the country's ships are being built on the Pacific Coast. These and other important factories are located in the Puget Sound Area of Washington and in the vicinity of the metropolitan areas of Portland, Oregon, and San Francisco, Los Angeles and San Diego, California.[29] From these ports men and materials move to the broad Pacific battle areas. Seattle is the principal port in the northwest from which troops and materials to Alaska are supplied. Within this metropolitan area are located the vital aircraft and shipbuilding plants of the northwest—the Bremerton Navy yard, the Boeing aircraft factories, and some of the most vital shipbuilding ways of the nation. Within this same area was concentrated most of the Japanese of the northwest, as depicted by Chart 7, App. page ii.

The San Francisco area is one of the great ports for the Pacific Coast. It is invaluable to the Army and Navy. The Mare Island Navy Yard, the Hunter's

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[29]A reference to the spot map (Chart 3, opp. p. 11), showing the disposition of the Japanese population, pictures the high concentration of persons of Japanese ancestry in the Pacific Coast area.

"This court can take judicial notice of the extensive manufacturing facilities for airplanes and other munitions of war which are located on or near our west coast." (*Ex parte Kanai*, 46 Fed. Supp. 286, 288 (D.C., E.D., Wisc., July 29, 1942.)

Point docks, the San Francisco and Golden Gate bridges, the Kaiser and Marinship and numerous other shipyards, the Permanente magnesium mill are but a few of the important plants. Chart No. 8, App. iii presents the picture of the concentration of Japanese in this area.

Metropolitan Los Angeles is one of the greatest aircraft centers of the world including the great Douglas, Lockheed, Vega, and Bendix factories. Other defense plants number into the many hundreds. There should be superimposed on this scene the picture presented by Chart 9, App. page iv, showing the concentration of Japanese in the Los Angeles Metropolitan Area. This shows that Terminal Island, with the nearby Navy shipyards, air fields and harbor facilities, was occupied almost exclusively by Japanese. (Chart 9, App. page iv.)[30]

Of scarcely secondary importance is the protection of the lumber industry of Washington, Oregon and California. The large area devoted to this industry afforded saboteurs unlimited freedom of action. The

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[30]Part 29, San Francisco Hearings Tolan Committee. Included in Exhibit B, p. 10988, is a letter dated February 19, 1942, from C. B. Horrall, Chief of Police of Los Angeles, to the Attorney General of California, in which it is stated:

> "It is my opinion that the danger, especially for fifth-column activities in this district, is serious. This is due to the fact that there are some twenty-five to thirty thousand Japanese in this area and the location of a large portion of these are in very strategic areas. These strategic areas are in the very close proximity of the coastal regions where an invasion party would necessarily be landed. I have no doubt that they would lend any and all assistance possible to a Japanese land invasion, and several of the Japanese who are believed to be as patriotic as any, have expressed the above opinion in interviews." (p. 10989.)

danger from forest fires involved not only the destruction of valuable timber but also threatened cities, towns and other installations in the affected area. Mr. Smith Troy, Attorney General of the State of Washington in his statement to the Tolan Committee declared that the protection of the lumber resources of the State presented tremendous difficulties in view of the possibility of sabotage, and that lumber was a vitally important defense material needed in the construction of ships and camps.[30a] The entire coastal strip from Cape Flattery south to Lower California is particularly important from a protective viewpoint. There are numerous naval installations and the coastline is particularly vulnerable. Distances between inhabited areas are great and enemy activities might be carried on without interference.[31]

The Attorney General of the State of California, with the assistance of the law enforcement authorities of the State, examined the location of persons of Japanese ancestry with reference to strategic military installations and defense premises. His report concluded:

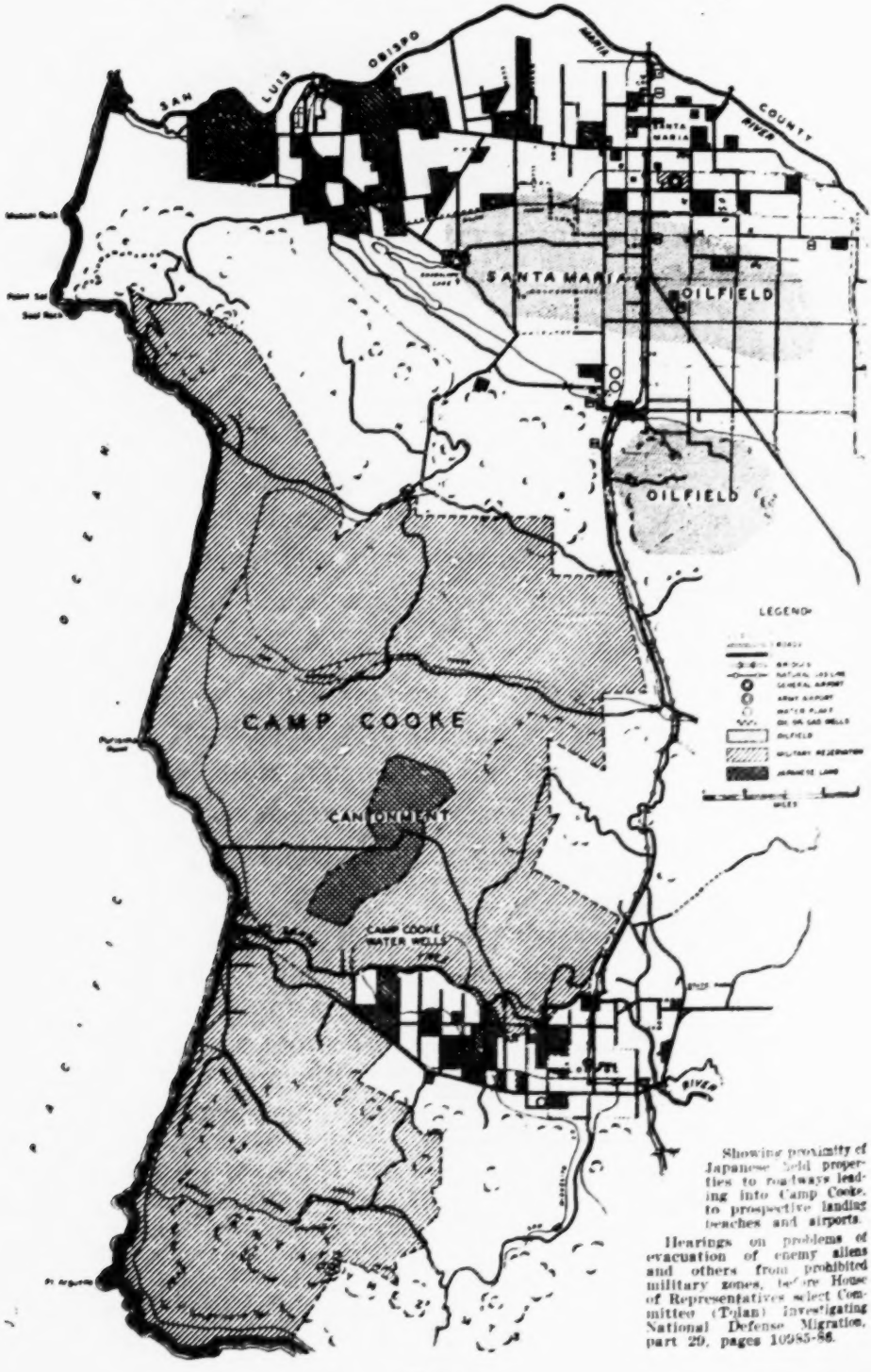
> "It shows that along the coast from Marin County to the Mexican border virtually every important strategic location and installation has one or more Japanese in its immediate vicinity. The same situation exists in those counties of the Sacramento and San Joaquin Valleys that have

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[30a] *Tolan Committee Hearings*, Part 30, p. 11501.

[31] The possibility of infiltration by enemy agents was forcefully brought to this Court's attention in the facts which it studied in connection with the landing of German saboteurs on the Long Island and Florida Coasts. (*Ex parte Quirin*, U.S. Sup. Ct. Oct. 29, 1942; 87 L.Ed. 1.)

COAST OUTLINE OF SANTA BARBARA COUNTY



Showing proximity of Japanese held properties to roadways leading into Camp Cooke, to prospective landing beaches and airports.

Hearings on problems of evacuation of enemy aliens and others from prohibited military zones, before House of Representatives select Committee (Tolan) investigating National Defense Migration, part 29, pages 10985-86.

Chart 5.

Santa Barbara County

The beach at the north end of the county, upon which Japanese are living, is entirely open to landing.

In the city of Santa Maria, Japanese-owned land is adjacent to the principal San Francisco-Los Angeles telephone lines, power lines, water works and Pacific Coast highway.

Japanese lands near Lompoc cover the only entrance to Camp Cook. Because of the nature of the terrain, the Japanese could block the entrance to this military reservation.

The Santa Ynez Valley, equally as fertile as the Santa Maria Valley, but containing no strategic points, has no Japanese living within it.

The Santa Maria, El Capitan, Goleta and Summerland oil fields are surrounded by or adjacent to Japanese occupied lands. Such lands are also in close proximity to the Santa Barbara airport, gas storage plants, gas lines, main railroad line, main highway and a radio broadcasting station (shelled by Japanese submarine).

Near Santa Barbara, the United States lighthouse is completely surrounded by Japanese-occupied lands.

Thus if the Japanese located on the aforementioned lands acted in unison, they could destroy railroad and highway communications, telephone connections, gas plants, four oil fields, a light house and a radio station. They could assist an enemy landing on the coast.

(For further details see Tolan Committee Hearings, Part 29, pp. 10985-10986.)

any considerable Japanese population, and in San Bernardino, Riverside, and Imperial Counties."[32]

An illustration is presented in the accompanying Chart 5, opposite, together with the excerpt from the report of the District Attorney of Santa Barbara County, showing the situation in his county.

In the San Diego area a number of our most important aircraft manufacturing plants are located as well as Army and Navy installations and public utilities needed for their operations. The accompanying Chart 6, opposite page 32, of San Diego County shows some of the particular points where Japanese were immediately adjacent to these important installations.

I. Internal Security Threatened by Anti-Japanese Disturbances.

Because of the growing bitterness of war, together with the basis for suspicion due to the characteristics of the Japanese population on the Pacific Coast, just reviewed, it was reasonable for the Commanding General to anticipate that the continued presence of Japanese in Pacific Coast military areas would present a constant threat of anti-Japanese disturbances. This would endanger the internal security of the area. Therefore it was necessary, in order to preserve internal security as well as to protect the Japanese themselves, to remove them from Pacific Coast military zones.[33]

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[32]Statement by Hon. Earl Warren, Attorney General of the State of California, before Tolan Committee. (Part 29, San Francisco Hearings.)

[33]"Even from the small areas that they have left up to the present time there are many, many Japanese who are now roaming around the State and roaming around the Western States in a

Based upon his contact with the prosecuting attorneys of the State of Washington, the State Attorney General, the Honorable Smith Troy, related to the Tolan Committee that:

> "During the past several weeks, there has been a growing concern among all prosecutors about the possibility of mob violence against both citizens and alien Japanese which might flare up as a result of severe war casualties or other inflaming incidents of the war."[33a]

Thus it is seen that there was a real and present danger of attack or invasion and that among the 112,000 persons of Japanese ancestry within the Pacific Coast States there was reason to believe that there were a considerable number of American-Japanese who were potentially disloyal and, because of their location, were capable of conducting espionage for the enemy and committing sabotage to war plants and utilities in a way which might have had disastrous consequences for the Pacific Coast and have seriously interfered with America's success in its war with Japan. We now consider the action which was taken to meet this military problem.

III. THE ACTION TAKEN.

To meet the pressing and serious situation on the Pacific Coast and to authorize action with reference to other persons whose presence was deemed dangerous to the defense of military areas, President Roose-

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condition that will unquestionably bring about race riots and prejudice and hysteria and excesses of all kind." (Tolan Committee Hearings, Warren, Part 29, p. 11015.)

[33a]Tolan Committee Hearings, Seattle Pt. 30, p. 11503.

COAST OUTLINE OF SAN DIEGO COUNTY

Showing location of Japanese operated farms and Japanese households and relation to aircraft factories, power lines, Army and Navy establishments, ports of embarkation and important highways and prospective landing beaches.

Hearings on problems of evacuation of enemy aliens and others from prohibited zones before Select House of Representatives Committee (Tolan) Investigating National Defense Migration, page 10984.

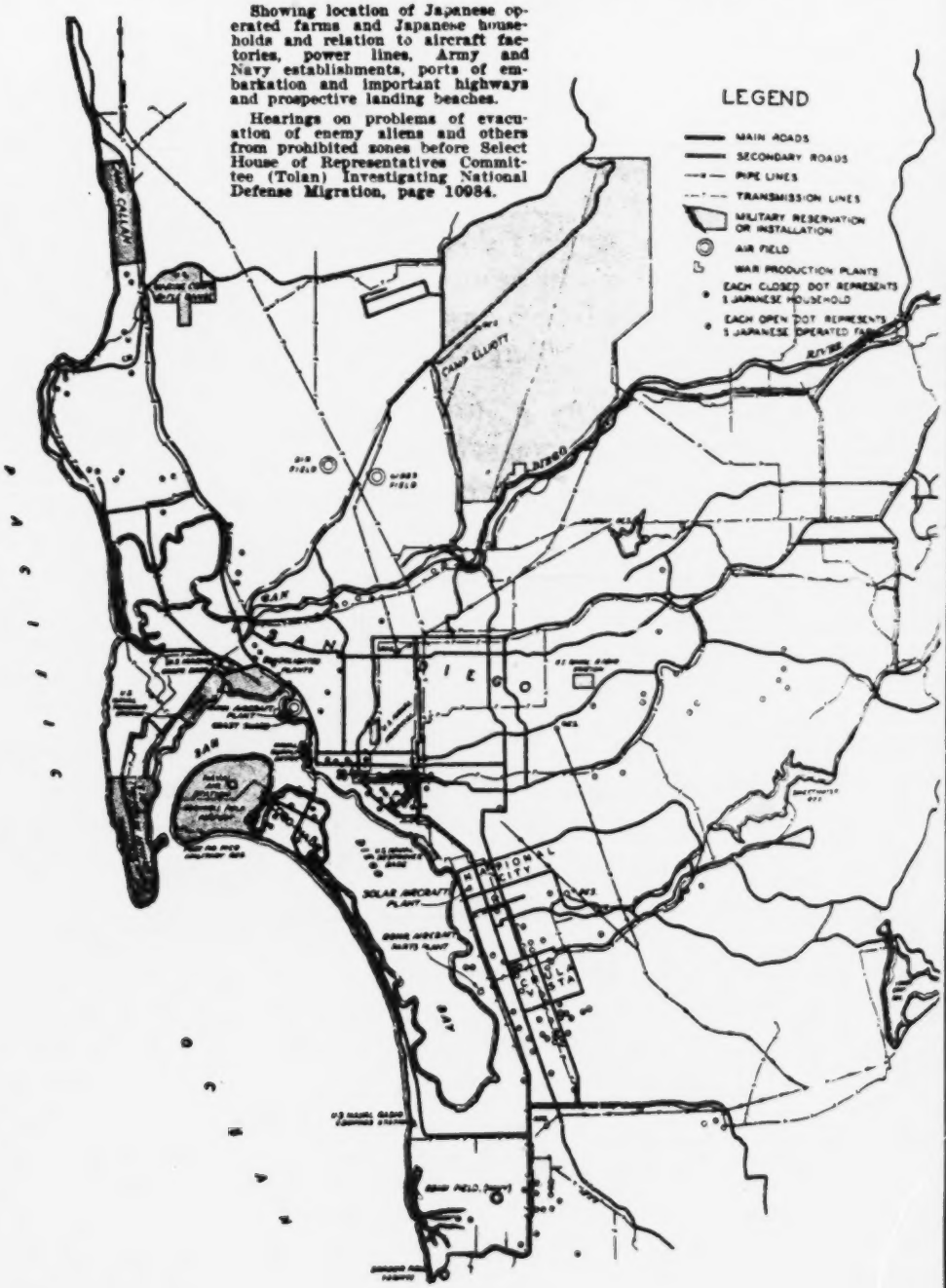


Chart 6.

San Diego County

Thirty miles of open coast containing main railroad and highway. Japanese live throughout this area.

Japanese are located at following strategic points:

Near naval ammunition depot, Marine Corps base, naval training station, Fort Rosecrans military reservation, destroyer base, naval supply depot and Coast Guard depot.

Adjacent to water wells, pumps, lines and dams supplying water to military reservations and the county.

Adjacent to Camp Callan and power lines supplying the Camp and San Diego.

In the vicinity of Solar Aircraft, Rohr Aircraft, Ryan Airplane and three Consolidated Aircraft plants.

Adjacent to Navy Airport at Ream Field, Army Airport at Border Field and San Diego Municipal Airport.

(For further details see Tolan Committee Hearings, Part 29, pp. 10984-10985.)

velt on February 19, 1942, as Commander-in-Chief of the Army and Navy, issued Executive Order 9066 (U.S.C. Cong. Ser. No. 2, p. 157 (1942)), authorizing and directing the Secretary of War or the military commanders designated by the Secretary, to prescribe military areas whenever it was deemed necessary, from which all persons might be excluded and, within the discretion of either of such officers, to impose restrictions with respect to the right of any person to enter, remain in or leave such military areas. The President's order was based on the ground that the successful prosecution of the war required every possible protection against espionage and sabotage to national defense material, national defense premises and national defense utilities. The next day the Secretary of War designated Lieutenant General J. L. DeWitt, Commanding General of the Western Defense Command and Fourth Army, as the military commander to carry out the terms of Executive Order 9066 in the Western Defense Command.[34]

On March 2, 1942, General DeWitt by Proclamation No. 1 (March 2, 1942, 7 Fed. Reg. 2320) declared that as the Western Defense Command was a theater of operations and because the Pacific Coast was particularly subject to attack, to an attempted invasion, and in connection therewith to sabotage and espionage, it was necessary to adopt military measures to safeguard against such operations. Therefore, pursuant to the power granted by President Roosevelt in Executive Order 9066 and by authorization of the Secretary of War, Military Areas Nos. 1 and 2 (Chart 1, opposite

[34]Letter from Secretary of War to Lieutenant General J. L. DeWitt, February 20, 1942.

p. 3) were established as a matter of military necessity. Military Area No. 1, as then defined, included approximately the western half of Washington, Oregon and California and the southern half of Arizona[35] and still coincides approximately with the Army's Pacific Combat Zone. The proclamation then stated that such persons or classes of persons as the situation required would be excluded from all of Military Area No. 1 and from certain zones in Area No. 2. By Proclamation No. 2 (March 16, 1942, 7 Fed. Reg. 2405) other prohibited zones within Area No. 2 were established under similar conditions. See Chart 1, opposite page 3.

The War Relocation Authority was established on March 18, 1942, by Presidential Executive Order 9102[36] "in order to provide for the removal from designated areas of persons whose removal is necessary in the interests of national security". The Authority was authorized to formulate and effect a program for the removal from the areas of persons designated under Executive Order 9066 and to provide "for their relocation, maintenance, and supervision".

With Proclamations 1 and 2 and Executive Order 9066 before it, Congress, in order to provide for enforcement in the Federal Criminal Courts of the orders issued under the Executive Order, on March 21, 1942, enacted Public Law 503 (77th Cong., 2nd Sess., Ch. 191). This Act declared it to be a misdemeanor for anyone to enter, remain in or leave or commit

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[35]Because the military situation no longer required it, the area in the State of Arizona prohibited to persons of Japanese ancestry by Proclamation No. 1 has been reduced. (Proclamation No. 16, March 17, 1943, 8 Fed. Reg. 3256.)

[36]U.S.C. Cong. Ser. No. 3, p. 265 (1942).

any act in any prescribed military area or zone contrary to the order of the Secretary of War or any designated military commander, provided such person knew or should have known of the restrictions or orders and that his act was in violation thereof.[37]

By Proclamation No. 3 (March 24, 1942, 7 Fed. Reg. 2543), curfew hours were established for all persons of Japanese ancestry, and all alien enemies in Military Area No. 1 and certain zones in Military Area No. 2. This is the order which appellant was found to have violated under Count II of the indictment. (Tr. 2-3.)

By Public Proclamation No. 4 (March 27, 1942, 7 Fed. Reg. 2601), General DeWitt prohibited enemy aliens and all persons of Japanese ancestry from leaving Military Area No. 1 after March 29, 1942, until further notice. Thereafter a series of Civilian Exclusion Orders were issued by which all persons of Japanese ancestry, both alien and non-alien except in special cases, were excluded from all portions of Military Area No. 1 and certain portions of Military Area No. 2.

The appellant, residing within Military Area No. 1, was ordered excluded under Civilian Exclusion Order No. 57, dated May 10, 1942. (Tr. 1-2.)

On June 8, 1942, Proclamation No. 7 (7 Fed. Reg. 3062), referring to the Civilian Exclusion Orders by which all persons of Japanese ancestry were excluded

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[37] "BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That whoever shall enter, remain in, leave or commit any act in any military area or military zone prescribed, under the authority of an Executive Order of

from portions of Military Area No. 1, declared that Lieutenant General J. L. DeWitt, pursuant to the authority vested in him by the President of the United States and by the Secretary of War and under his powers as Commanding General, ratified the Civilian Exclusion Orders and excluded all persons of Japanese ancestry from all portions of Military Area No. 1.

A. The curfew and exclusion orders, applied on a group basis within the military areas, were conceived in good faith in the face of emergency and were directly related to the mission of the Commanding General in defending the Pacific Coast and preventing sabotage and espionage.

The need for action being clear, and the authority to exclude persons from military areas having been granted, the remaining consideration concerns the propriety of excluding all persons of Japanese ancestry as a group from the military area and imposing curfew as an incident thereto. In judging the reasonableness of dealing with the problem upon a group basis, the three Pacific Coast States appearing here as *amici curiae* believe that it is of the utmost importance for the members of the Court to judge the good faith and validity of the Commanding General's action in the light of the facts as they existed on the Pacific

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the President, by the Secretary of War, or by any military commander designated by the Secretary of War, contrary to the restrictions applicable to any such area or zone or contrary to the order of the Secretary of War or any such military commander, shall, if it appears that he knew or should have known of the existence and extent of the restrictions or order and that his act was in violation thereof, be guilty of a misdemeanor and upon conviction shall be liable to a fine of not to exceed $5,000 or to imprisonment for not more than one year, or both, for each offense." (77th Cong., 2nd Sess., Ch. 191.)

Coast when the curfew and evacuation orders were issued in March and in May, 1942—a period when the Japanese were at the height of their military fortunes. (*Mitchell v. Harmony,* 13 How. 115 (1851).) In passing upon the group exclusion, judgment should not be based on conditions as they now exist a year after the exclusions were ordered and when the dangers have somewhat subsided, although the possibility of raids remains and precautions against sabotage and espionage must be maintained until the war is over.

It is clear that the exclusion was considered entirely as a matter of military necessity and that no foundation exists for any claim that the action of the President or Commanding General was the result of a public clamor born of old prejudices.[38]

If it cannot be said that group exclusion was not an unreasonable method with which to meet the emer-

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[38] "What arguments were presented to the President by the military authorities of this district have not been made known, but to assume that General DeWitt, the Federal Bureau of Investigation, the Army and Naval Intelligence were motivated by race prejudice, greed for land, or popular hysteria, as this letter calmly does, is just silly. And, it was the arguments of this group that plainly impressed the President.

"One has but to recall the original objections of the administration, as voiced by Attorney General Biddle, to removal of the Japs, to realize that it was not popular clamor that influenced the President, but very cogent evidence submitted by the military command. The implication that the President would be swayed by race prejudice, greed, or hysteria is no compliment. His instincts are in the other direction. * * * The exclusion was a military measure and was recognized as such, and as necessary, by the Japanese themselves, who submitted to it * * *. These Japanese knew that there were traitors to the United States in their midst and further that complete identification of all of them was impossibly difficult."—An editorial on the proposal of the Post-War Council's plea to President Roosevelt to revoke evacuation order—Los Angeles Times, May 19, 1942.

gency, the Court will not substitute its judgment for that of the military commander. As this Court said in *Moyer v. Peabody,* 212 U.S. 78 (1909), speaking through Mr. Chief Justice Holmes:

> "When it comes to a decision by the head of the State upon a matter involving its life, the ordinary rights of individuals must yield to what he deems the necessities of the moment. Public danger warrants the substitution of executive process for judicial process. See *Kelly v. Sanders,* 99 U.S. 441, 446. This was admitted with regard to killing men in the actual clash of arms, and we think it obvious, although it was disputed, that *the same is true of temporary detention to prevent apprehended harm.* * * *" (p. 85.)

Similarly, this precept will apply when the President through his military commanders excludes persons from vital military areas to prevent apprehended harm.

The scope of the powers of the President in time of war, acting as Commander-in-Chief, were thus described in *Stewart v. Kahn,* 11 Wall. 493 (1870):

> "The President is the Commander-in-Chief of the Army and Navy, and of the militia of the several States, when called into service of the United States, and it is made his duty to take care that the laws are faithfully executed. Congress is authorized to make all laws necessary and proper to carry into effect the granted powers. The measures to be taken in carrying on war and to suppress insurrection are not defined. The decision of all such questions rests wholly in the discretion of those to whom the substantial powers involved are confided by the Constitution. In the

latter case the power is not limited to victories in the field and the dispersion of the insurgent forces. It carries with it inherently the power to guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its rise and progress." (pp. 506-507.)

There were many among those excluded who were undoubtedly loyal—some of them are now proudly wearing the American uniform. But in the light of the military situation (supra, page 9) and the characteristics of the Japanese population on the Pacific Coast as a whole (supra, page 11), there was undoubtedly reason to believe that, among this group of over 112,000 people possessing strong racial and cultural ties with the enemy, there was enough potential disloyalty, which could not be sifted by administrative hearings in sufficient time, to justify the removal of the danger within the group by the removal of the group as a whole.

Although adhering to the majority dictum in *Ex parte Milligan,* 4 Wall. 2 (1866), as to the occasion when a military commander may exercise control over civilians, the trial Court in *United States v. Yasui*[39] recognized that in view of the situation on the Pacific Coast, persons of Japanese ancestry, aliens and citizens alike, represented a reasonable classification for the regulations issued:

"The conditions and necessities of preparation for modern war had previously been recognized

[39]Now before this Court, *Yasui v. United States,* No. 871.

by this court. The areas and zones outlined in the proclamations became a theatre of operations, subjected in localities to attack and all threatened during this period with a full scale invasion. The danger at the time this prosecution was instituted was imminent and immediate. The difficulty of controlling members of an alien race, many of whom, although citizens, were disloyal with opportunities of sabotage and espionage, with invasion imminent, presented a problem requiring for solution ability and devotion of the highest order." (U.S.D.C., D. of Ore., No. 16056; Tr. 18-19.)

The emergence of a substantial group of the supporters of Japan among the persons of Japanese ancestry at the Manzanar Relocation Center[40] resulting in serious riot and bloodshed substantiates the belief of the military authorities that there were potentially

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[40]Excerpt from news report in San Francisco (California) Call-Bulletin, December 7, 1942:

"MANZANAR, Dec. 7 (AP). A pro-Axis celebration of the sneak attack on Pearl Harbor caused a riot in the Japanese relocation center here last night and troops called to restore order fired several shots into the surging mob, killing one Japanese and wounding nine.

Ralph P. Merritt, project director, said the rioting started Saturday night when Japanese loyal to America interfered with a meeting called by the Kibei, anti-American group. Merritt called for military assistance and the disturbance was quelled.

• • • • • • •

Last night the factions began fighting and soon there were 4,000 in a milling crowd. Shouts of 'Pearl Harbor, Banzai! Banzai!' had precipitated a free-for-all. • • •"

disloyal elements in considerable numbers among Pacific Coast Japanese.[41]

The subsequent declaration of loyalty for Japan by twenty-four per cent of American Japanese of draft age is a further indication of the existence of

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[41]Excerpt from editorial in Seattle (Washington) Post-Intelligencer, December 9, 1942:

"Riots staged by anti-American Japanese in Arizona and California camps lead to two conclusions. One is that the Army moved none too soon in its general evacuation of Japanese from coastal areas. • • •"

Excerpt from editorial in Los Angeles (California) Times, December 9, 1942:

"Events at the Japanese centers at Manzanar and at Poston, Arizona, prove up to the hilt the necessity of Gen. DeWitt's order clearing all persons of Japanese ancestry out of the Pacific Coast military areas. The evacuation order, it will be remembered, was roundly criticized by uniformed Easterners and by some Westerners who should have known better. It is now clear that the feeling of too many Japanese was entirely unfriendly to the United States, and that considerable members of Japanese born here were included in the unfriendly group. For the safety of the Japanese themselves—and the safety of Japanese loyal to the United States at least was entitled to protection—the evacuation was wise and necessary."

Excerpt from editorial in Long Beach (California) Press-Telegram of December 8, 1942:

"The riot furnished a sufficient answer to those who have been questioning the wisdom of the Army's isolation of Japanese inhabitants of this country. All Japanese were moved away from potential war zones along the coast and placed under guard in camps of the interior for the good and sufficient reason that some of them were dangerous to the United States when this nation and Japan were involved in war, and nobody could tell certainly which of the Japanese were loyal to America and which were enemies at heart.

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The violent demonstration by pro-Axis Japanese at Manzanar does not provide the evidence whereby a complete separation of the sheep and the goats can be made, but it does prove beyond any doubt that a considerable percentage of the Japanese in this big relocation camp are loyal to Japan and consequently are enemies of the United States."

a disloyal attitude toward America.[42] It is a speculation that such an expression for Japan would have been forthcoming at a hearing which would have had for its purpose the determining of whether or not the individual should remain in a Pacific Coast Military Area. The possibility that the disloyal elements would have been disclosed through the holding of individual hearings is, at least, sufficiently doubtful that it cannot be said that the Commanding General committed an abuse of discretion when he decided on the more certain course of removing all disloyal elements by removing the group as a whole.[43]

The apparent reasonableness of the evacuation was set forth by the Tolan Committee in its report[44] to Congress, wherein it declared:

> "This committee does not deem its proper province to encompass a judgment on the military need for the present (and any subsequent) evacu-

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[42]Elmer M. Rowalt, Deputy Director of the War Relocation Authority (WRA), states that answers to the War Department's recruiting questionnaire show that the number of professedly disloyal Japanese will total about 24% of the military eligibles, ranging from 3% at the Minadoka Center in Idaho to 52% at Manzanar, California. Each of the camps has a population of about 10,000.—San Francisco Examiner (Wash. Bureau), April 30, 1943.

[43]A news article on disloyalty among Japanese at relocation centers states:

> "Many actively subversive alien Japanese have already been confined in detention camps, but it is said that fully as many, undetected in the first stages of the war, are still mingling in the centers with Japanese who have been pronounced harmless to date by military intelligence and the Federal Bureau of Investigation." (San Francisco Examiner, dated May 1, 1943.)

[44]H.R. No. 1911, 77th Cong., 2nd Sess., March 19, 1942, pp. 13-14.

ation orders. In time of war the military authorities are obligated to take every necessary step and every precaution to assure the internal safety of the Nation. The need for these safeguards appears the more pressing when we consider that present-day warfare has developed the fifth-column technique in unprecedented fashion. It is naive to imagine that the enemy powers will not exploit these techniques to the full. The tragic events of Pearl Harbor have created in the public mind a consciousness, whatever the character of the evidence, that the dangers from internal enemies cannot be ignored." (p. 13.)

"Various arguments were adduced in testimony before the committee why the Japanese, both citizen and alien, should be evacuated from the west coast. Most commonly it was said that homogeneity of racial and cultural traits made it impossible to distinguish between the loyal and the disloyal. Law enforcement officials were particularly concerned lest enraged public sentiment and possibly mob action, occasioned by reverses in the Pacific war theater, would work injury to innocent and guilty alike. Protection for Japanese residents as well as for the whole Nation was said to require the immediate evacuation of all Japanese." (p. 14.)

B. The military commander as a matter of law was entitled to employ the precautionary and preventive measures of curfew and exclusion without conducting individual hearings.

One of appellant's principal contentions is that he and the others evacuated with him were denied due process because the military authorities should have conducted individual hearings to determine the loyalty of persons to be evacuated. (Tr. p. 41.) As previously

noted the ready answer to this suggestion is that this Court will not attempt to judge the merits of the procedure by which the Commanding General met the military situation as against another method which might have been employed. The Court will have performed its function when it has determined that the Commanding General acted in good faith and that the adoption of the method of group evacuation was within the range of honest judgment which military commanders are allowed in meeting military problems within their jurisdiction. (*Sterling v. Constantin,* 287 U. S. 378 (1932); *Moyer v. Peabody,* 212 U. S. 78 (1909); *Stewart v. Kahn,* 11 Wall. 493 (1870).)

Because the Japanese population has remained apart from the rest of the people of the Pacific Coast and because inscrutability is a definite racial characteristic, it was at least doubtful whether any safe and practical measure for determining prospective disloyalty could have been employed.

Regarding the lack of an adequate test, former Attorney General Earl Warren of California testified before the Tolan Committee as follows:

> "We believe that when we are dealing with the Caucasian race we have methods that will test the loyalty of them, and we believe that we can, in dealing with the Germans and the Italians, arrive at some fairly sound conclusions because of our knowledge of the way they live in the community and have lived for many years. But when we deal with the Japanese we are in an entirely different field and *we cannot form any opinion that we believe to be sound.*"[45]

[45]Tolan Committee Hearings, Part 29, p. 11015.

The Attorney General of California is the chief law enforcement officer of the State. (Calif. Const., Art. V, Sec. 21.) The above statement, therefore, representing the opinion of the law enforcement officers who have observed the Pacific Coast Japanese for many years, is particularly significant.

Only a brief consideration of the task of investigating and holding hearings for 100,000 people will reveal the difficulties and scope of the task and the time required. From the matters already discussed it is evident that there were many pro-Japanese influences which might have offset the loyalty to this country which otherwise might be assumed to exist. To judge such an imponderable thing as loyalty in these cases would call for a consideration of those influences and experiences of a lifetime which go to make up the final spirit and feeling of loyalty to a country. Now, if the immediate danger has been removed and time has become available for thorough investigation, it may be possible to devise an adequate test and to separate the loyal from the disloyal. However, this would not mean that General DeWitt, in the face of the emergency, should have taken the time or have resolved doubts against employing the precaution of removing the entire group in order to secure the safety of the military area.[46]

> "* * * it can hardly be said to be unreasonable to go on the assumption that among the Japanese communities along the coast there is enough dis-

[46]Recent developments at Relocation Centers, where admittedly disloyal elements have revealed themselves, indicate that previous checks for disloyalty were misleading. (News report, San Francisco Examiner, May 1, 1943, supra note 43.)

> loyalty, potential if not active, to make it expedient to evacuate the whole. Perhaps ninety-nine peaceful Japanese plus an unascertainable one who would signal to a submarine would add up to a sufficient reason for evacuating. If it were a matter of punishment, this sort of reasoning would be brutal. But no one supposes that evacuation, any more than detention under Regulation 18B in England, *is defensible on any other basis than prevention.* When one considers the irreparable consequences to which leniency might lead, the inconvenience, great though it may be, seems only one of the unavoidable hardships incident to the war. In this judgment General DeWitt doubtless acted on such intelligence as was available, and, it is to be remembered, with the express sanction of the President and the Congress." (Fairman, *The Law of Martial Rule and the National Emergency,* 55 Harv. L. R. 1254, 1302 (June, 1942.)

The curfew and evacuation orders were issued solely as a military measure to insure the defense of the area and to prevent sabotage and espionage rather than waiting to punish such acts after the injury has occurred. As Professor Fairman has acutely observed:

> "A commander should not be put in a worse position legally because he has contrived to keep disaster at arm's length." (Fairman, *The Law of Martial Rule and the National Emergency,* 55 Harv. L. R. 1254, 1288 (June, 1942).)

IV. IN TIME OF WAR MAY THE MILITARY AUTHORITIES EXERCISE CONTROLS OVER CIVILIANS RESIDENT WITHIN THE STATES?

It is the purpose of this section to discuss the general question of the right of military authorities in time of war to exercise controls, such as curfew and exclusion, over civilians in the territory of the States.

One of the prime objects of the Federal Constitution as declared by its preamble is "to provide for the common defense". This war power the Constitution divides between the President and Congress. Congress is granted the power to declare war and to provide for the common defense (Art. I, Sec. 8, Cls. 1, 11), to raise and support armies (Art. I, Sec. 8, Cl. 12), to make rules for the governance of the armed forces (Art. I, Sec. 8, Cl. 14), and to make all laws which shall be necessary and proper for carrying these powers into execution (Art. I, Sec. 8, Cl. 18). Art. IV, Sec. 4, provides that the United States "shall protect the states against invasion". Upon the declaration of a national war, the administrative task of protecting the states against invasion and conducting the war to a successful conclusion lies with the President as Commander-in-Chief of the Army and Navy and is carried out by him through his Secretary of War and the duly constituted subordinate military commanders. (*Moyer v. Peabody,* 212 U. S. 78 (1909), quoted supra, p. 38; *Stewart v. Kahn,* 11 Wall. 493 (1870), quoted supra, p. 38.)

The fundamental proposition here asserted is that the President as Commander-in-Chief, acting through his subordinate military commanders, has the power

in domestic territory lying within a theater of operations to undertake precautionary and preventive measures affecting the civilian population, which as a matter of military necessary are required for the defense of the area and the successful prosecution of the war. The need for such authority is made evident by today's type of warfare, which is waged swiftly and violently and at long range upon civilians, factories and fields far beyond the zone of action of contending armies. It places many areas, although removed from the battlefront, within a theater of operations. The supply and manufacture of war materials is so vital to success upon our world-flung battlefields that the protection against sabotage, espionage and fifth column activities within domestic territory makes the protection of home defense installations, war plants and public utilities a fundamental military concern of those charged with the responsibility of conducting the war to a successful conclusion. As this Court said recently in *United States ex rel. Quirin v. Cox* (U. S. Sup. Ct., Oct. 29, 1942, 87 L. Ed. 1):

> "Modern warfare is directed at the destruction of enemy war supplies and the implements of their production and transportation quite as much as at the armed forces."

Ordinarily the constitutional rights, privileges and immunities of American citizens cannot be curtailed by military authorities, and local, state and federal laws prescribe the standards of lawful conduct. But there are occasions, in time of war when to meet an emergency the military authorities, in carrying out

their constitutional function of conducting the war, may adopt measures directly affecting the conduct of civilians and temporarily limiting their constitutional rights.

A. Martial law in time of war.

This particular exercise of the war power is usually described as martial rule or martial law, as distinguished from the other manifold exercises of the war power by the Executive and Congress.[47]

Speaking of Presidential Executive Order 9066, the Tolan Committee observed:

> "This order of February 19 has *established a form of limited martial law* permitting control over all persons in designated areas and resulting in the evacuation of an entire group, including citizens and aliens."[48]

When the occasion requires, individual rights such as those affected by curfew and evacuation orders must temporarily bend to the exercise of the paramount and fundamental constitutional right of the State to preserve itself. In *Shimola v. Local Board,* 40 F. Supp. 808 (D.C. Ohio, 1941), it was recently said:

> "The civil rights which petitioner contends for are more violently assailed from without than from within. The very name of the rights which petitioner champions implies a limitation on

[47]Fairman, *The Law of Martial Rule* (1930) p. 31. Concurring opinion, Chase, C.J., in *Ex parte Milligan,* 4 Wall. 2 (1866).
[48]General observations on the President's Executive Order of February 19, 1942.—Final Report, Tolan Committee, p. 21.

their use. Civil rights have always been subject to military exigency." (p. 810.)

As former Chief Justice Hughes said, when speaking of the war powers under the Constitution in an address before the American Bar Association in 1917 during another critical period in our history:

> "We are making war as a nation organized under the constitution, from which the established national authorities derive all their powers either in war or in peace. The constitution is as effective today as it ever was and the oath to support it is just as binding. But the framers of the constitution did not contrive an imposing spectacle of impotency. One of the objects of a 'more perfect union' was 'to provide for the common defense.' A nation which could not fight would be powerless to secure 'the Blessings of Liberty to Ourselves and our Posterity.' Self-preservation is the first law of national life and the constitution itself provides the necessary powers in order to defend and preserve the United States. Otherwise, as Mr. Justice Story said, 'the country would be in danger of losing both its liberty and its sovereignty from its dread of investing the public councils with the power of defending it. It would be more willing to submit to foreign conquest than to domestic rule.' "[49]

Such an extraordinary exercise of power can only be justified by supervening necessity.

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[49]Reports of A.B.A., 1917, p. 248; Sen. Doc. No. 105, 65th Cong., 1st Sess., p. 3.

Martial law is part of our common law, although an extraordinary part,[50] and in its greatest extent is an accompaniment of war.[51] It has been likened to the public right of self-defense by an individual:

> "Martial law is the public right of self-defense against a danger threatening the order or the existence of the state."[52]

As already noted, the President as Commander in Chief acting through his subordinate military commanders has the power to do all that is necessary to protect each of the states "against invasion". (Const., Art. IV, Sec. 4.) Today sabotage, espionage and the fifth column technique are the preludes to invasion. Measures taken to prevent the use of these methods of modern warfare are within the mandate of the Federal Government.

> "Thus imbedded in the very fiber of the Constitution, we find not only the authority for martial rule, but the occasions which require and justify it, and as well the limits of its operation."[53]

B. Exclusion without a preliminary hearing as a proper exercise of martial law.

This Court has conceded the right of the military commander to take precautionary and preventive measures such as the removal of persons from disturbed areas until the restoration of peace, without the holding of any trial.

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[50]Pollock. *Expansion of the Common Law*, pp. 105-106.
[51]Fairman, *The Law of Martial Rule* (1930), p. 98.
[52]Wiener, A Practical Manual of Martial Law, p. 16 (1940). See also Winthrop, *Military Law and Precedents*, Reprint, p. 820.
[53]Graham, *Martial Law in California*, 31 Cal. L. R. 6, Dec. 1942.

In *Moyer v. Peabody*, 212 U. S. 78 (1909), this Court upheld the sustaining of a demurrer to a complaint seeking damages against a governor and his military commanders for detaining one Moyer, the head of a miners' organization, on the ground that it was a proper measure of martial law. The disorder was attributed to the actions of the members of the organization. It was alleged that the imprisonment, which had been for a period of two and a half months, was without probable cause and that the plaintiff had been deprived of his liberty without due process of law. As in the present case, it was alleged that no complaint had been filed against Moyer and that the civil courts were open, reliance being placed upon *Ex parte Milligan*, 4 Wall. 2 (1866), and *Ex parte Merryman*, 9 Am. L. R. 524, 17 Fed. Cas. No. 9487 (1861). (p. 80 of 212 U.S.) The Court, in upholding the judgment, first pointed out that the detentions of persons for the purpose of restoring order were not by way of punishment "but are by way of precaution to prevent the exercise of hostile power" and that when the head of the State acted upon a matter involving its life the executive could employ "temporary detention to prevent apprehended harm". (p. 85.)[54]

Moyer had previously petitioned the Colorado courts for a writ of habeas corpus to obtain his release from the military detention. (*In re Moyer*, 35 Colo. 154, 85 Pac. 190 (1904).) The writ was denied and the detention was upheld as a reasonable measure for the state military authorities to take, in these words:

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[54]Supra, p. 38.

"To deny the right of the militia to detain those whom they arrest while engaged in suppressing acts of violence and until order is restored would lead to the most absurd results. The arrest and detention of an insurrectionist, either actually engaged in acts of violence or in aiding and abetting others to commit such acts, violates none of his constitutional rights. *He is not tried by any military court, or denied the right of trial by jury; neither is he punished for violation of law* * * *. *His arrest and detention in such circumstances are merely to prevent him from taking part or aiding in a continuation of the conditions which the Governor, in the discharge of his official duties and in the exercise of the authority conferred by law, is endeavoring to suppress.* * * * It is true that petitioner is not held by virtue of any warrant, *but, if his arrest and detention are authorized by law, he cannot complain* * * *." (85 Pac. 193.)

Cox v. McNutt, 12 F. Supp. 355 (1935);

In re Boyle (Idaho, 1899), 57 Pac. 706;

Ex parte McDonald, 49 Mont. 454, 143 Pac. 947 (1914).

The conclusion to be drawn from such precautionary measures of martial law as exclusion or detention has been well stated by Wiener, supra:

"Whenever there is riot or insurrection, there are pretty certain to be ringleaders; once these are apprehended, the back of the disturbance is likely to be broken. Accordingly, commanders ordered into the field to suppress domestic disorders have almost invariably centered their attention on the heads of the offending movement, have arrested

them, and have kept them in custody until such time as the disorders subsided and/or the persons detained could be turned over to the civil authorities for trial. *In many instances, no trial ever took place; the detention was conceived to be entirely preventive and not at all punitive.* * * * This procedure, which did not involve the suspension of the writ of habeas corpus, or the supersession of civil courts by military tribunals, or indeed any domination of the civil authorities by the military but rather the closest cooperation between them, *has come fairly generally to be known as qualified martial law or preventive martial law.* Where there has been violence or disorder in fact, continued detention of offenders by the military is so far proper as to result in a denial by the courts of writs releasing those detained and a refusal, after they have been released, of damages for false imprisonment. The legality of the practice has been sustained in Idaho, Colorado, Montana, New Mexico, Indiana, and Iowa, and has received the imprimatur of approval of the United States Supreme Court in *Moyer v. Peabody.* It is, therefore, hardly open to question today."[55]

Fairman reaches a similar conclusion:

"It would seem to follow from the foregoing that preventive detention for a reasonable period is regarded by the courts as a legitimate means of coping with an insurrection, and that in the exercise of judicial discretion a writ of habeas corpus may not be allowed if it would interfere with the

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[55] Wiener, *A Practical Manual of Martial Law* (1940), Para. 71, pp. 66-67.

governor in the performance of his duty to suppress insurrection."[56]

C. The English courts have upheld the validity of excluding persons from vital war zones.

If such precautionary measures may be undertaken in times of domestic unrest they are also proper in time of war when the life of the nation is at stake.

During the last World War the British House of Lords, in *Rex v. Halliday* (1917), 1 A.C. 260, affirming (1916) 1 K.B. 238, upheld the propriety of regulations by which the residence of any person could be regulated or any person excluded or interned in view of the hostile origin or *associations* of the person, when it appeared to the Secretary of State expedient for securing the public safety. The Court said:

"One of the most obvious means of taking precautions against dangers such as are enumerated is to impose some restriction on the freedom of movement of persons whom there may be any reason to suspect of being disposed to help the enemy. It is to this that reg. 14B is directed. *The measure is not punitive but precautionary.* It was strongly urged that no such restraint should be imposed except as the result of judicial inquiry, and *indeed counsel for the appellant went so far as to contend that no regulation could be made forbidding access to the seashore by suspected persons.* It seems obivous that no tribunal for investigating the questions whether circumstances of suspicion exist warranting some restraint can be imagined less appropriate than a Court of law.

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[56]Fairman, *The Law of Martial Rule* (1930), Para. 44, p. 177.

No crime is charged. The question is whether there is ground for suspicion that a particular person may be disposed to help the enemy. * * *" (p. 269.)

The Court then makes some observations which we believe are particularly pertinent to the instant case:

"However precious the personal liberty of the subject may be, there is something for which it may well be to some extent, sacrificed by legal enactment, namely, national success in the war, or escape from national plunder or enslavement. *It is not contended in this case that the personal liberty of the subject can be invaded arbitrarily at the mere whim of the Executive.* What is contended is that the Executive has been empowered during the war, for paramount objects of State, to invade by legislative enactment that liberty in certain states of fact." (p. 271.)

"One of the most effective ways of preventing a man from communicating with the enemy or doing things such as are mentioned in s. 1, sub-s. 1(a) and (c), of the statute is to imprison or intern him. In that as in almost every case where preventive justice is put in force some suffering and inconvenience may be caused to the suspected person. That is inevitable. But the suffering is, under this statute, inflicted for something much more important than his liberty or convenience, namely, for securing the public safety and defense of the realm." (p. 273.)

See

King v. Governor of Wormwood Scrubbs Prison (1920), 2 K.B. 305.

It is true that the regulations or orders provided that the internee could make any representations to an advisory committee against the order, which would then make a report to the Secretary. This in no way affected the broad discretionary power given to him, nor did it take from him the sole power to decide whether the internment order should be revoked or varied. This is evident from the language of the order, "If I am satisfied by the report * * * that the order may be revoked or varied without injury to the public safety or defense of the realm, I will revoke or vary the order * * *."

And more recently, under conditions of World War II, where sabotage and espionage are being employed as instruments of warfare as never before, the English Courts have upheld the power of the Executive to remove or detain citizens whose actions might endanger the conduct of the war.[57] In *Liversidge v. Anderson* (1942), 1 A.C. 206, the House of Lords upheld the internment of a British citizen under Regulation 18B of the Emergency Powers (Defense) Act of 1939 (2 and 3 Geo. VI, c. 62), which provided that the Secretary of State could make detention orders "with a view to preventing (the internee) acting in a

[57]In Canada regulations similar to the English regulations have been adopted. By the order of the Minister of Justice, dated August 18, 1942, a protected area in the Province of British Columbia along the Pacific Coast has been prescribed similar to the Pacific Coast Military Areas, which order provides in part:

"9. Every person of the Japanese race shall leave the protected area aforesaid forthwith.

10. No person of Japanese race shall enter such protected area except under permit issued by the Royal Canadian Mounted Police." (*Canadian Gazette*, Extra No. 96, August 31, 1942.)

manner prejudicial to the public safety or defense of the realm." The House of Lords reiterated what it had previously said in *Rex v. Halliday,* supra:

> "At a time when it is the undoubted law of the land that a citizen may by conscription or requisition be compelled to give up his life and all that he possessed for his country's cause it may well be no matter for surprise that there should be confided to the Secretary of State a discretionary power of enforcing the relatively mild precaution of detention." (Per Lord Macmillan, p. 47.)
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> *Greene v. Secretary of State for Home Affairs* (1942), 1 A.C. 284.

In commenting upon the English decisions Professor Fairman says:

> "All of this, one may say, is no precedent for construing our own Constitution. But where kindred people who once held the same doctrines as ourselves have been driven to adopt new views of war power, that experience is most persuasive in weighing the authority to be conceded to our own government in like emergencies."[58]

D. The decisions of the District Courts.

In *Ex parte Kanai,* 46 Fed. Supp. 286 (D.C., E.D., Wisc., July 29, 1942), the petitioner, an American citizen of Japanese ancestry, resident in San Francisco, California, sought to obtain his release upon a writ of habeas corpus when he was taken into custody in Milwaukee, Wisconsin, for his return to San Francisco to stand trial on an information charging him under Public Law 503 with having left Military Area

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[58]Fairman, *The Law of Martial Rule and the National Emergency,* 55 Harvard L. R. 1253, 1256 (June 1942).

No. 1 contrary to the exclusion orders of Lieutenant General DeWitt. His petition challenged the constitutionality of Presidential Executive Order 9066, the particular Exclusion Order, which was identical with the one here under review, and Public Law 503. The Court, in denying the petition, held that the exclusion of all persons of Japanese ancestry from the Pacific Coast was a constitutional exercise of the war power:

> "* * * This court will not constitute itself as a board of strategy, and declare what is a necessary or proper military area. * * * The field of military operation is not confined to the scene of actual physical combat. Our cities and transportation systems, our coastline, our harbors, and even our agricultural areas are all vitally important in the all-out war effort in which our country must engage if our form of government is to survive. * * * The theater of war is no longer limited to any definite geographical area. Saboteurs have already landed on our coasts. This court can take judicial notice of the extensive manufacturing facilities for airplanes and other munitions of war which are located on or near our west coast." (p. 288.)

> "Rights of the individual, under our federal Constitution and its amendments, are not absolute. When such rights come into conflict with other rights granted for the protection and safety and general welfare of the public, they must at times give way. * * * *In re Schroeder Hotel Co.* (CCA, 7th), 86 F. (2d) 481; *Hitchman Coal & Coke Co. v. Mitchell, et al.*, 245 U. S. 229. * * * That there is nothing about the executive order, or the designation of the military areas, which is unconstitutional, is very certain, considering the necessities

> and the exigencies of war which have already struck upon our Pacific Coast." (p. 288.)[59]

In *Ex parte Ventura,* 44 Fed. Supp. 520 (W.D., Wash., N.D., 1942), a Japanese American citizen, resident of Seattle, sought by a petition for a writ of habeas corpus to challenge the validity of the curfew orders as imposed upon American citizens of Japanese ancestry. The Court upheld the curfew orders as a proper military measure in the light of conditions within the Western Theater of Operations.

> "I do not believe the Constitution of the United States is so unfitted for survival that it unyieldingly prevents the President and the Military, pursuant to law enacted by the Congress, from restricting the movements of civilians such as petitioner, regardless of how actually loyal they perhaps may be, in critical military areas desperately essential for national defense." (p. 523.)

E. Martial law by the test of necessity may be limited.

It is not necessary for the military authorities to replace civilian authorities completely. Under martial law all civilian functions may be taken over, or it may be limited to particular phases concerning the defense of a military area such as the institution of curfew,

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[59]In *United States v. Korematsu* (U.S.D.C., N.D., Cal., S.D., No. 27635-W, 1942) the defendant, an American Japanese resident in San Francisco, by demurrer raised objections, similar to those offered by appellant, to an information charging him under Public Law 503 with having violated an exclusion order. The demurrer was overruled by Judge Martin I. Welsh on December 1, 1942, and Korematsu was tried and convicted by Judge A. F. St. Sure (S.F. Recorder, December 9, 1942). An appeal has been taken to the Ninth Circuit Court of Appeals (No. 10,248). Certain procedural questions certified by the Ninth Circuit Court are now before this Court for decision.

dim-out,[60] and the requiring of the evacuation of certain persons as in the present case.

As Winthrop says in *Military Law and Precedents,* Reprint, page 820:

> "Martial law is indeed resorted to as much for the protection of the lives and property of peaceable individuals as for the repression of hostile or violent elements. It may become requisite that it supersede for the time the existing civil institutions, but, in general, except in so far as relates to persons violating military orders or regulations, or otherwise interfering with the exercise of military authority, martial law does not in effect suspend the local law or jurisdiction or materially restrict the liberty of the citizen; it may call upon him to perform special service or labor for the public defense, but otherwise usually leaves him to his ordinary avocation."

Commonwealth ex rel. Wadsworth v. Shortall, 206 Pa. St. 165, 55 Atl. 942 (1903);

Ex parte McDonald, 49 Mont. 454, 143 Pac. 947 (1914);

In re Boyle (Idaho, 1899), 57 Pac. 706.

One of the best expressions of the principle is contained in Bishop, *New Criminal Law,* 8th Ed., sec. 53 (1892):

> "Martial law is elastic in its nature and easily adapted to varying circumstances. It may operate to the total suspension or overthrow of civil authority; or its touch may be light, scarcely felt

[60]Opinion NS4826 of Attorney General of California, holding that Dim-out Proclamation No. 12 (Oct. 10, 1942, 7 Fed. Reg. 8377) by Lieutenant General J. L. DeWitt, was a proper exercise of limited martial law which superseded lighting requirements of the California Vehicle Code.

or not felt at all by the mass of the people, while the Courts go on in their ordinary course, and the business of the community flows in its accustomed channels."

F. A declaration of martial law is not required.

Appellant argues that martial law has not been declared on the Pacific Coast. (Tr. 40.) The fact that martial law has not been proclaimed in Washington, Oregon or California or that the military authorities have not taken over all civilian functions does not mean that the within principles of martial law do not apply to the measures undertaken by the military authorities on the Pacific Coast. No formal declaration of martial law was needed as a prerequisite to the measures of martial law which have already been undertaken. If the necessity exists to exercise military control in a particular manner, a proclamation is unnecessary. It is the necessity which provides the justification, not the issuance of a proclamation.[61]

The trial court in *Yasui v. United States* (No. 871) rejected the concept that the military authorities could exercise limited martial rule such as the imposition of curfew. This is opposed to the weight of authority,

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[61] *Executive Order 9066.* No declaration of martial law accompanied the issuance of Presidential Executive Order 9066 under which the evacuation of Japanese-Americans from Pacific Coast military areas was accomplished.

Professor Charles Fairman, the author of "The Law of Martial Rule" (1930), commented on this fact as follows:

> "The President has made no such proclamation and if he did his constitutional powers would not be increased one whit. The question in every case of military control would still be, can the action complained of be justified as apparently reasonable and appropriate, under the circumstances to the defense of the nation and the prosecution of the war?" (San Francisco Chronicle, March 4, 1942, p. 14.)

which is collected and discussed in Fairman, *Law of Martial Rule and the National Emergency,* 55 Harv. L. R. 1254, 1287, and in Wiener, *A Practical Manual of Martial Law* (1940), p. 19.

G. The test of necessity.

The test of necessity which will justify the exercise of military authority over civilians should be formulated and applied in accordance with today's military problems. It is contended that the curfew and exclusion orders were not valid because no invasion of the States of Washington, Oregon and California had deposed the civil authorities or had closed the civil courts. Reliance for this proposition that the justifying situation must be in this extremity before a military commander can act is placed mainly upon the dictum of the majority in *Ex parte Milligan,* 4 Wall. 2 (1866). Because of the frequent reference to this famous Civil War case, a close analysis is justified in order to show the proper application of what was said in that case.

In 1864 Lambdin P. Milligan, a civilian and resident of the State of Indiana, was arrested by order of General Hovey. He was tried before a military commission convened at Indianapolis, on various charges of aiding the Southern cause, and sentenced to be hanged. At the time of the arrest Indiana was not threatened with attack, although previously Southern troops had invaded the State. Milligan's petition for a writ of habeas corpus reached the United States Supreme Court upon a certificate of disagreement from the Federal Circuit Court. The writ was granted upon the ground that Congress, to whom, the Court

said, the power was committed, had not authorized trial by military commission.[61a] The decision, joined in by all members of the Court, disposed of the case upon jurisdictional grounds. However, a bare majority of five went on gratuitously[62] to say that Congress in any case would not have had the power to authorize trial by military commission at any place outside the theater of active war, because, it said:

> "Martial law cannot rise from a threatened invasion. The necessity must be actual and present; the invasion real, such as effectively closes the Courts and deposes the civil administration. * * * Martial rule can never exist where the Courts are open and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war." (p. 127.)

On the other hand, a minority of four, led by Chief Justice Chase, in a specially concurring opinion, took issue with this dictum and contended that:

> "Where peace exists the laws of peace must prevail. What we do maintain is, that when the nation is involved in war and some portions of the country are invaded and all are exposed to invasion, it is within the power of Congress to determine in what states or districts such great

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[61a]Congress had provided that if those arrested by Presidential authority were citizens of States *where the administration of law by the Federal Courts was unimpaired*, the lists of these citizens must be sent to the local Federal Judges, who could then release any prisoner not indicted by the next Federal Grand Jury; the statute said nothing about military trials of such prisoners. (12 Stat. 755 (1863).)

[62]Haney, C.J., dissenting in *Zimmerman v. Walker*, 132 Fed. (2d) 442 (1942), states that the general statement of the majority was not dicta (p. 450). Nevertheless, the right of the military to impose restrictions upon civilians within the United States when reasonably necessary to *repel* invasion is recognized.

> and imminent public danger exists as justifies the authorization of military tribunals for the trial of crimes and offenses against the discipline and security of the army or against the public safety." (p. 140.)

Because of the frequent reference made in this case to the fact that the Courts in this combat zone were open and in the proper and unobstructed exercise of their jurisdiction, it is important to note that this part of the majority dictum must be confined to the serious question of whether or not and upon what occasion a civilian may be tried by military commission.[63] It is difficult to perceive what application, one way or another, the fact that the Courts are open or not would have upon a determination of the justification for the Army's taking precautionary measures to prevent sabotage and espionage and to protect the civilian population within a theater of operations.

The view of the majority that martial law must be confined to the locality of actual war does not require a change of this phase of the test of necessity but merely a new and realistic conception of the locale of war being waged today. In 1866, when the Supreme Court rendered the Milligan decision, the methods of warfare were such that a civilian government would be disrupted and unable to secure public safety at home only when a locality lay under the seige guns of an attacking force. The Court then was lookng at a scene where the principal offensive force was the foot

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[63] As the Court itself puts the question, "Upon the *facts* stated in Milligan's petition, and the exhibits filed, has the military commission mentioned in it *jurisdiction*, legally, to try and sentence him?" *Ex parte Milligan*, 4 Wall. 2, 118 (1866). (Italics by the Court.)

soldier and cavalry and where civilian authority could carry out its function of maintaining the safety of citizens until it was forced to flee by the imminent danger of capture. Seventy-seven years ago the theater of actual war wherein the army might have to exert control was the area of operations of the contending armies.[64]

Even during the last World War, in *United States ex rel. Wessels v. McDonald,* 265 Fed. 754 (1920), a Federal Court held that New York Harbor was "within the theater of war". The decision upheld the authority of a naval court martial to try the plaintiff, Herman Wessels, as a German spy because of his espionage activities in the vicinity of New York Harbor. Wessels contended that on the basis of the *Milligan* case, the naval court had no jurisdiction to try him because his activities were in the United States, rather than in Enrope where the fighting was going on. Furthermore, he contended the Federal Courts in

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[64]But even in 1904, Sir Frederick Pollock, a student of martial law, wrote:

"It also seems that the range of those acts must extend to the prevention of aid and comfort to the enemy beyond the bounds of places where warlike operations are in sight. In many places there may outwardly be peace, and yet modern means of communication may admit of important aid being conveyed to the enemy in the shape of information, supplies, and personal adherents. In this manner the effective radius of a state of war has been multiplied tenfold or more. By recognizing this fact we do not alter the law, but apply it to the facts as they exist; nor do we disparage the wisdom of our predecessors who declared their opinion of the law in a form appropriate to the facts as known to them."—Sir Frederick Pollock, Law Quarterly Review, Vol. XVIII, p. 152 (1904).

"What was not necessary a century ago may be necessary today."—Haney, J., dissenting in *Zimmerman v. Walker,* 32 Fed. (2d) 442.

the New York Federal District were functioning. On appeal the Federal Court upheld the jurisdiction of the naval court and pointed out:

> "The term 'theater of war', as used in the Milligan case, apparently was intended to mean the territory of activity of conflict. With the progress made in obtaining ways and means for devastation and destruction, the territory of the United States was certainly within the field of active operations. Great numbers of troops were being sent abroad, and in large numbers, sailing from the Port of New York. * * * Ships were being destroyed within easy distance of the Atlantic coast; there was a constant threat of and fear of airships above the harbor and City of New York on missions of destruction." (p. 764.)

What the Court said twenty-three years ago is now many times as obvious and applicable to the present situation on the Pacific Coast. A review of the authorities indicates that there is general agreement that the majority dictum went too far when it said that martial law cannot arise from a threatened danger; that the Courts and civil administration must already have been deposed.

Fairman, *The Law of Martial Rule* (1930), p. 145;

Willoughby, *Constitutional Law,* 2nd Ed. III, 1602;

Glenn, *The Army and the Law,* 188-190.

The dictum of the majority fails to meet today's wartime conditions. It requires an invasion and the complete breakdown of civil government before the military may act.

Insistence upon applying the dictum of the *Milligan* case to today's conditions may be a judicial example of the disastrous error into which many democracies have fallen—that of affording more protection to the civil liberties at home than to safeguarding them from the attacks from without.

Former Chief Justices Hughes, speaking before the American Bar Association in 1917 about the test in the *Milligan* case, said:

> "Certainly, the test should not be a mere physical one, nor should substance be sacrified to form."[65]

In 1919 Judge Learned Hand, writing in *Commercial Cable Co. v. Burleson,* 255 Fed. 99 (1919), with reference to the President's power as Commander-in-Chief to take over cable lines for war use, declared:

> "But, indeed, it would be a lame comprehension of the scope and variety of modern war, which limited its activities to the immediate theater of military operations." (p. 104.)

Today our nation-wide civilian defense preparations illustrate that many areas of the United States can be considered a theater of war. This was recently and vividly made clear by the landing on our eastern shores of German saboteurs whose sabotage objectives lay in various places in the East and Midwest. (*Ex parte Quirin,* supra.) Today long-range bombing planes and carrier-based aircraft and far-roving submarines place a large portion of our country and States within the area of threatened invasion.

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[65] *War Powers Under the Constitution,* A.B.A. Rep., 1917, p. 248; Sen. Doc. 105, 65th Cong., 1st Sess., p. 3.

Ex parte Ventura, 44 Fed. Supp. 520, 523 (1942);
Ex parte Kanai, 46 Fed. Supp. 286, 288 (1942).

V. EXTENT OF JUDICIAL REVIEW OF ACTION TAKEN BY MILITARY AUTHORITIES.

In *Sterling v. Constantin,* 287 U. S. 378 (1932), this Court declared:

> "What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions." (p. 399.)

It is quite clear that this Court had in mind that a military commander in time of war, charged with the awful responsibility of conducting his mission as part of the whole plan for the successful conduct of the war and the protection of civilians within his command, must be allowed a wide choice of the means by which he will meet emergencies affecting his mission. As this Court pointed out in the *Sterling* case, the Executive acting in his military capacity will be allowed "a range of honest judgment as to the measures to be taken * * *, *for without such liberty to make immediate decisions, the power itself would be useless*". (p. 399.)

To hold the curfew and evacuation orders invalid, the Court would have to say that there was no foundation for a military commander to believe that the Japanese population on the Pacific Coast had to be, as a whole, moved inland.

As Mr. Justice Haney said in *Zimmerman v. Walker,* 132 Fed. (2d) 442:

> "Where the military asserts a right to exercise *some powers of government, usually in the form of restrictions,* and do not approach a complete military government, the right, if it exists at all, comes from the right to do all that is necessary 'to execute the Laws of the Union, suppress insurrections and repel invasions' and to protect each of the states 'against Invasion'. Compare: Winthrop, supra, 1275. Whether a particular action is 'necessary' is a question of fact to be determined from proof of, among other things, the reason for the restriction, its purpose, and the improvement of methods and engines of war. What was not necessary a century ago, may be necessary today.
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> * * * * * * *
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> "If the courts find that the action of the military is reasonably necessary to accomplish one of the four purposes mentioned above, then the case is ended because the Constitution prohibits further action by the courts, but if the court makes a contrary finding, it has the Constitutional duty to carry out its function to declare the military action ineffective." (at pp. 450, 451, 452.)

The possibility that disloyalty, either potential or active, could have been disclosed through the holding of individual hearings is at least sufficiently doubtful, particularly in view of the time element, so that it can be said that General DeWitt certainly did not abuse his discretionary powers or go beyond the range of his honest judgment when he decided to remove all persons of Japanese ancestry, as a group, from

the vital Pacific Coast military areas. The evacuation was obviously conceived in good faith in the face of the emergency and directly related to the danger at hand.

As the United States District Court for the Southern District of New York said in *United States v. Uhl,* 46 Fed. Supp. 618 (1942), with reference to the President's proclamation in ordering the detention of enemy aliens:

> "This court, in times like these, will resolve any doubts it may have * * * in favor of the President's and Attorney General's actions."

Or, as the trial court said:

> "Nor can defendant substitute his judgment for the judgment of the Commander in Chief and the general acting under the President's direction, pursuant to constitutional powers and the Congressional ratification and authority of Public Law 503." (46 Fed. Supp. 657, 662 (1942).)

The argument here presented can well be concluded with what the Circuit Court of Appeals for the Ninth Circuit recently said in *Zimmerman v. Walker,* 132 Fed. (2d) 442 (1942), concerning detention as a proper preventive measure of martial law:

> "The civil courts are ill adapted to cope with an emergency of this kind. As a rule they proceed only upon formal charges. Their province is to determine questions of guilt or innocence of crimes already committed. In this respect their functions are punitive, not preventive; whereas the purpose of the detention of suspected persons in critical military areas in time of war is to forestall injury and to prevent the commission of acts helpful to the enemy. It is settled that the

> detention by the military authorities of persons engaged in disloyal conduct or suspected of disloyalty is lawful in areas where conditions warranting martial rule prevail. Measures like these are essential at times if our national life is to be preserved. Where taken in the genuine interest of the public safety they are not without, but within, the framework of the constitution." (p. 446.)

Likewise, with the less severe measure of exclusion, persons suspected of disloyalty may be excluded from a military area in time of war where such exclusion has a reasonable bearing upon the defense of the area.

VI. CONGRESS HAD THE POWER TO ENACT PUBLIC LAW 503 IN AID OF THE PRESIDENT'S POWER AS COMMANDER-IN-CHIEF AND THAT OF HIS SUBORDINATE COMMANDING GENERALS TO MAKE RULES PERTAINING TO THE CONDUCT OF CIVILIANS IN PRESCRIBED MILITARY AREAS.

A. Public Law 503 Did Not Delegate Authority to the President.

Thus far it has been demonstrated that the President as Commander-in-Chief and his military commanders, in the exercise of their constitutional power to conduct the war and to protect the Pacific Coast States against attack and threatened invasion could impose curfew regulations upon all persons of Japanese ancestry and could order them to evacuate these areas. The next important question which the *amici curiae* wish to discuss is the validity of Public Law 503 (77th Cong., 2nd Sess., Ch. 191, March 21, 1942) under which the appellant was convicted for having violated the curfew proclamation and Exclusion Order 57 (Tr. 1-2).

The States of Washington, Oregon and California are vitally interested in having upheld the validity

of this Act, which provides a sanction under federal criminal law for the enforcement of the measures which the Commanding General has adopted or may in the future adopt for the protection of the Pacific Coast, as, for example, Proclamations Nos. 10 (Aug. 5, 1942, 7 Fed. Reg. 6631) and 12 (Oct. 10, 1942, 7 Fed. Reg. 8377), providing for dim-out. Public Law 503 specifically refers to entering, remaining in or leaving a prescribed military area or the doing of any other act contrary to the restrictions applicable in the area, or to the order of the Secretary of War or any designated military commander. A person cannot be found guilty thereunder unless he knew or should have known of the existence and the extent of the restrictions and orders and that his act was in violation thereof. This law is attacked on the ground that it improperly delegates to the President, the Secretary of War or any designated military commander the power first to designate the military area or zone and then to determine the acts prohibited therein, the doing of which the law makes criminal. (Tr. 42.)

Public Law 503 is not an unconstitutional delegation because the power to designate military areas in domestic territory and, under military necessity, to forbid the doing of acts therein already resides in the President and his subordinate military commanders by virtue of the war power. (Supra, Pt. 2.) This right to prescribe the military areas and to make restrictions therein resides in the military authorities without any authority from Congress.

All this law attempts to do is to provide for enforcement in the Federal criminal courts of the orders

issued by the military authorities pursuant to the war power of the President. That this was its purpose is evident from the congressional debates on the law at the time of its passage.[66]

The United States Supreme Court has recognized the power of Congress to provide sanctions for the carrying out of the constitutional powers of the Presidency. In *United States v. Curtiss-Wright Corporation,* 299 U. S. 304 (1936), the Supreme Court upheld a criminal statute passed for the purpose of assisting the President in carrying out his constitutional power to deal with foreign affairs. A congressional resolution authorized the President to prohibit the sale of munitions of war in the United States to countries engaged in war in the Chaco region of South America, except under such limitations and exceptions as he might prescribe, whenever he found that such prohibition would contribute to the reestablishment of peace between the countries involved. The resolution in effect provided a fine and/or imprisonment for sales made in violation of the proclamation (p. 312). The President thereafter made such findings in his proclamation. An indictment charging a violation of the Joint Resolution and the Proclamation of the President was demurred to on the grounds that the resolution constituted an unlawful delegation of legislative power to the executive. In part it was contended that the resolution was unconstitutional because it only went into effect upon the making of a proclamation which was left to his unfettered discretion, thus con-

[66]Congressional Record, March 19, 1942, pp. 2804, 2807 (unbound ed.). (House Report No. 1906, 77th Cong., 2nd Sess., pp. 2-3.)

stituting an attempted substitution of the President's will for that of Congress, and also that the extent of its operation in particular cases was subject to limitations and exceptions by the President, controlled by no standard. In rejecting these contentions (p. 329) the Court said that in in such external matters as foreign affairs and the waging of war the general rule regarding unlawful delegation of legislative authority either did not apply to such matters or would be very broadly construed.

> "Practically every volume of the United States Statutes contains one or more acts or joint resolutions of Congress authorizing action by the President in respect of subjects affecting foreign relations, which either leave the exercise of the power to his unrestricted judgment, or provide a standard far more general than that which has always been considered requisite with regard to domestic affairs."

Similarly the same freedom of action must be allowed the Commander-in-Chief in his conduct of the war. Part of the President's war power is the right to establish certain measures of control over civilian activity when military necessity requires, otherwise described as limited martial rule or law. This right is derived from his constitutional position and does not require an act of Congress for its exercise. Pointing out that the power to conduct foreign affairs was derived from the constitutional powers of the President, the Court said:

> "It is important to bear in mind that we are here dealing not alone with an authority vested in the

> President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—*a power which does not require as a basis for its exercise an act of Congress,* but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution." (pp. 319-320.)

Congress, to assist the President in performing his constitutional duty as Commander in Chief, may by statute provide a sanction to be administered in the Federal Courts, just as Congress did in the *Curtiss-Wright* case, to assist the President in carrying out his function in the field of international relations. In the *Curtiss-Wright* case the statute was upheld although it provided a punishment for the violation of the President's proclamation, which was to be made after the passage of the congressional act.

B. If Public Law 503 is considered as a delegation, such delegation was not unconstitutional.

While it is believed that Public Law 503 is valid when construed as a law which merely provides a sanction for the carrying out of an otherwise proper constitutional power committed to the President, nevertheless this law is not unconstitutional if it is interpreted as delegating to the President, the Secretary of War or designated military commanders the power to define military areas or zones and to prescribe restrictions therein, the violation of which the statute makes criminal.

Speaking of the delegation of the Congressional war power, it was recently said in *United States v. Wright,* 48 Fed. Supp. 687 (Jan. 1943):

> "* * * I find that no court has ever attempted to strike down what Congress has determined to be appropriate to carry into effect its broad war powers under the Constitution. In fact, the question of delegation has seldom, if ever, appeared in connection with a construction of the war power." (p. 689.)

In judging the use of Congressional war power, this Court said in *Hamilton v. Kentucky Distilleries, etc.,* 251 U. S. 146, 40 S. Ct. 106 (1919):

> "* * * to Congress in the exercise of its powers, not least the war power upon which the very life of the nation depends, a wide latitude of discretion must be accorded; * * *" (p. 163.)
>
> *Martin v. Mott,* 12 Wheat. 19, 30 (1827);
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> *Dakota Cent. Tel. Co. v. State,* 250 U. S. 163, 39 S. Ct. 507 (1919).

A case directly in point on the right of Congress to leave to the Executive the designation of the area within which an act may be criminal is *McKinley v. United States,* 249 U. S. 397 (1919), wherein an Act of Congress authorizing the Secretary of War to do everything "deemed necessary to suppress and prevent the setting up of houses of ill fame * * * within such distance as he may deem needful of any military camp * * *" was not held to be an unconstitutional delegation of legislative power. As stated by the Court:

> "Congress may leave details to the regulation of the head of an executive department, and punish those who violate the restrictions."

In other phases of federal activity, the Courts have upheld legislation making the violation of regulations a criminal act. In *Avent v. United States,* 266 U. S. 127 (1924), the Transportation Act (41 Stat. 456) authorized the Interstate Commerce Commission, whenever it is of the opinion that shortage of equipment, congestion of traffic or other emergency requiring immediate action exists in any section of the country, to make such reasonable rules with regard to it as in the Commission's opinion will best promote the service in the interest of the public and the commerce of the people. It also authorized the Commission to give directions for preference or priority in the transportation or movement of traffic. The defendant was indicted for a violation of a priority order. Holding that no constitutional question was involved, the Court said:

> "That it (Congress) can give the powers here given to the Commission, if that question is open here, no longer admits of dispute. *Interstate Commerce Commission v. Illinois Central Railroad Co.,* 215 U. S. 452; *United States v. Grimaud,* 220 U. S. 506.
>
> "The statute confines the power of the Commission to emergencies, and the requirements that the rules shall be reasonable and in the interest of the public and commerce fixes the only standard that is practicable or needed.

"Congress may make violations of the Commission's rules a crime."

The standard implied in Public Law 503 is that the restrictions must be appropriate to the conduct of the war in a military area. Orders of the military authorities beyond this test would be held to be *ultra vires* as being beyond the constitutional powers of the armed forces. In other words Public Law 503 is likewise confined to emergency situations and impliedly contains the requirement that the measures must bear a reasonable connection to military necessity. This is the only practicable standard which Congress could set down. What restrictions would be appropriate will change, from time to time and from place to place, with the changing war situation. It is the only standard under the circumstances "that is practicable or needed". (*Avent v. United States,* supra.)

With reference to the violation of Civilian Exclusion Orders such as No. 57, the one immediately involved here, it is important to note that the standard for these evacuation orders is specifically set forth in Public Law 503, which declares that "whoever shall enter, *remain in,* leave, * * *" any prescribed military area or zone contrary to the restrictions applicable in the area or zone shall be guilty of a misdemeanor. Hence, having in mind the foregoing authorities with reference to the power of Congress to authorize the issuance of regulations by executive branches of the government for the purpose of applying a standard and to make a disobedience of such regulations a

crime, it clearly appears here that with reference to Civilian Exclusion Orders such as No. 57, the standard of remaining in a military area or zone is clearly set in the statute.

In *Campbell v. Chase National Bank,* 5 Fed. Supp. 156 (1933), Congress (Title 50, App. sec. 5) authorized the President in time of war or other national emergency recognized and declared by him, to investigate, regulate and prohibit exporting, hoarding, melting or earmarking of gold or silver coin, etc. He was also authorized to make necessary rules and regulations. The Court, in holding that this grant of authority was not an unconstitutional delegation, declared:

> "It is now also settled that a regulation made within the mandate of such delegated power may be the basis of criminal proceedings." (Citing cases and *McKinley v. United States,* 249 U. S. 397.)

It should be noted that it is Congress which makes the disobedience of the military restrictions a crime and that no effort is made by the military authorities to prescribe, limit or enlarge the criminal penalty. In *United States v. Grimaud,* 220 U. S. 506 (1911), it was held that a statute providing that the Secretary of Agriculture "may make such rules and regulations * * * to regulate the use and occupancy (National Forest Reservations) and to preserve the forests therein from destruction; and any violation of the provisions of this act and such rules and regulations shall be punished" as provided by statute, was not an

invalid delegation of legislative power, the Court saying:

> "A violation of reasonable rules regulating the use and occupancy of the property is made a crime, not by the Secretary, but by Congress. The statute, not the Secretary, fixes the penalty."

In the instant case the restrictions and orders are based upon military necessity and the carrying out of the President's power to conduct the war. The violation of these restrictions and orders based upon military necessity is made a crime, not by the President, the Secretary of War or the military commander, but by Congress. The statute, not the President, the Secretary or the military commander, fixes the penalty.[67]

C. Ratification of curfew and exclusion orders by Congress.

Assuming that it was necessary for Congress to authorize the imposition of curfew and the exclusion of persons from military areas, the legislative history of the Act shows that the purpose of its passage was to implement the orders issued under Executive Order 9066 by providing for enforcement in the federal criminal courts, and that Congress had before it Public Proclamations Nos. 1 and 2, designating the military areas and specifically stating that such persons or classes of persons as the situation required

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[67]For a useful discussion on the general question of the delegation of Congressional war power, see Charles Evans Hughes, *War Powers Under the Constitution*, Reports of A.B.A., 1917, p. 248; Sen. Doc. 105, 65th Cong., 1st Sess.

would be excluded from these areas. Curfew was likewise contemplated.[68]

D. Public Law 503 is not invalid on the ground of uncertainty.

The contention is made that Public Law 503 is invalid because it falls within the rule that a criminal statute which does not define with certainty the acts prohibited is void. It is charged that the law does not inform a person of the nature and cause of the charge to be made against him and therefore violates the Fifth and Sixth Amendments to the United States Constitution.

The fundamental reason for all rules regarding certainty in criminal statutes is that a man cannot be punished for the doing of an act unless he had an opportunity to know just what was prohibited and just what was permitted. Where a statute itself defines the prescribed act with certainty, the law says that ignorance of the terms of the statute is no excuse. The ready answer to the objections to Public Law 503 on the ground of uncertainty is that the law is far more considerate of an accused and fulfills the re-

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[68] "The purpose of the proposed legislation is to provide for enforcement in the Federal criminal courts of orders issued under the authority of Executive Order No. 9066, dated February 19, 1942."—Letter of the Secretary of War to the Congress. (Congressional Record, March 19, 1942, p. 2804 (unbound ed.); House Report No. 1906, 77th Cong., 2nd Sess., p. 2.)

"• • • the bill, when enacted, should be broad enough to enable the Secretary of War or the appropriate military commander to enforce *curfew* and other restrictions within military areas and zones."—Letter of the Secretary of War to the Chairman of the Senate and House Committees on Military Affairs. (Congressional Record, March 19, 1942, p. 2807 (unbound ed.); House Report No. 1906, 77th Cong., 2nd Sess., p. 2.)

quirements of certainty with much greater strictness than the ordinary rules require, because it provides that a person can be punished only "if it appears that he knew or should have known of the existence and extent of the restrictions or order and that his act was in violation thereof".

SUMMARY.

In summary, the States of California, Oregon and Washington submit that the curfew and exclusion orders as they apply to all persons of Japanese ancestry in Pacific Coast military areas were imposed by the military commander in good faith, acting under the authority of the President as Commander-in-Chief; that they were not arbitrary but were appropriately directed to securing the safety of the Pacific Coast against threatened invasion, attack and from sabotage and espionage. This is established by the following factors:

1. This nation was suddenly thrust into war with the Empire of Japan.

2. There was a definite threat that the Pacific Coast would be attacked by air and sea and possibly invaded by land.

3. There were naval attacks upon coast defenses and installations on the California and Oregon coasts and continual sinkings and attacks upon coastwise shipping and convoys; Alaska was subjected to air attack and some of the islands within the Western

Defense Command were actually occupied by the enemy.

4. Over 112,000 persons of Japanese ancestry were concentrated in the three Pacific Coast States, many in the vicinity of national defense plants, materials and utilities.

5. This large group had cultural, religious, ideological and family ties with the enemy which had been maintained and strengthened by the activity of numerous pro-Japanese organizations.

6. A considerable number of Japanese American citizens had been indoctrinated through education in Japan.

7. The alien Japanese controlled the business of the Japanese communities and the activities of the Japanese organizations. The native-born Japanese were in the younger age groups and subject to the influence and control of their alien parents.

8. The possibility that the disloyal element in the group would be used as a fifth column for sabotage and espionage and assistance in the event of an invasion could not be overlooked.

9. The continued presence of these people within critical areas might have been the cause of serious anti-Japanese disturbances which would have interfered with the internal security of the area and might have been the cause of reprisals upon American civilians and soldiers in the hands of the Japenese government.

10. In the face of the emergency, time alone would not permit the holding of individual hearings. Be-

cause of the general inability to fathom the oriental mind, and because no adequate test could be devised to determine loyalty with the sureness which the situation required, the action of the Commanding General in removing the Japanese population as a group from the critical areas was a reasonable method of dealing with the situation. It was obviously conceived in good faith.

11. The Commanding General acted under express authority from the President and the Congress.

The States of the Pacific Coast believe that the matter of moving inland the Japanese population from military areas must be treated solely from the military viewpoint that such action was necessary to meet the threat of invasion, to provide for the defense of the area and to protect against sabotage, espionage and fifth column activities.[69] The possibility of the return of this group before the time when the military authorities believe that the safety of the Pacific Coast from these dangers will permit is looked upon with grave concern by the civil authorities of California, Washington and Oregon.

It is doubtful if the police power of the States in such a matter as this, which concerns national war policy, would be adequate to take action with reference to those Japanese possessing American citizenship. Furthermore, the civil criminal law is designed to punish for injury after it has occurred, but is wholly inadequate to take preventive action.

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[69]Note statement of Smith Troy, Attorney General of the State of Washington urging that the evacuation should be treated as a military problem.—Tolan Committee Hearings, Seattle, Part 30, p. 11,503.

"Martial rule, as we have seen, is the law of necessity; civil government is not. The danger is that we may get into the habit of trying to solve through civil government matters that are not capable of solution by our ordinary democratic processes. This may cause us to take short cuts that violate both constitutional and statutory law. We will be encouraged to substitute for a government of laws, a government of men who will determine for themselves the necessity for extra-legal action. If we do this, we are breaking down the Constitution and principles of free government for which we are fighting. Furthermore, it is doubtful that upon the return to peace we would be able to get back our democratic processes, the type of local government and the civil rights which we had at the beginning of the war.[69a]

For these reasons it is believed that in conformity with the principles of martial law, which is the law of necessity, military commanders in time of war within military areas should be able to control the activities of the civilian population within such areas to the extent that the military situation requires such control. They should be able to adopt measures for the defense of the area and to facilitate the prosecution of the war.

What is military necessity in time of war changes with the change in the methods and strategies of war-

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[69a] Warren, *War-Time Martial Rule in California*, Cal. State Bar Jr., July-August, 1942, pp. 201-202.

fare. Today the military should not have to wait until an invasion has closed the Courts and deposed the civil government before acting in the defense of the nation's interest. In choosing the method by which an emergency will be met the military commander should be allowed a range of honest judgment. However, the Courts must remain the final arbiter of whether or not the officer has acted in good faith and within the range of such judgment.

Congress, under Public Law 503, has validly provided a sanction for the enforcement of the military regulations. These regulations are not issued by way of any delegation but are under the war power of the President as Commander-in-Chief. Even if this statute is tested from the standpoint of delegation, the delegation, being under the broad scope of congressional war power, is not unconstitutional.

Some general observations on the fundamental issue.

The considerations advanced here are made with a realization of the importance of preserving the fundamental rights of all citizens, regardless of race or color. The genius of America has been its ability to accommodate men of different races, creeds and colors and to remove the distinctions based on these differences. Wars with the land of origin sometimes sharply reveal the distinctions which still exist and point to the need for continued Americanization.[70]

But in time of war it is obvious that the great constitutional guaranties of personal and property

[70]Tolan Committee Final Report (H. R. No. 2124, 77th Cong., 2nd Sess., May 1942), p. 11.

rights are not absolute and must bend to the paramount and fundamental right of the public person, the State, to preserve itself. As former Chief Justice Hughes said, when speaking before the American Bar Association in 1917 at another critical period of our history:

> "We are making war as a Nation under the constitution, from which the established national authorities derive all their powers either in war or in peace. Self-preservation is the first law of national life and the constitution itself provides the necessary powers in order to defend and preserve the United States."[71]

There is little merit in the contention that such control exerted for reasons of military necessity such as that which has been reviewed here will lead to military dictatorship. Protection against excessive military action lies in our Courts, in the non-political character of our Army and Navy, in an independent Congress, and in the need for securing popular support for the conduct of the war. Because the military authorities, under the paramount duty to preserve the nation, may find it necessary for military reasons to limit temporarily, within military areas, the usual freedom of action of our citizens or the use of their property does not mean that these rights will remain restricted throughout the indefinite peaceful future

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[71] *War Powers Under the Constitution*, Reports of A.B.A., 1917, p. 248; Sen. Doc. 105, 65th Cong., 1st Sess., p.....

which it is hoped lies before us.[72] As the Tolan Committee concluded:

> "Emergency measures must not be permitted to alter permanently those fundamental principles upon which this National was built."

This will not happen while this Court sits.

At another critical war period in our history the great Lincoln was also charged with the destruction of constitutional liberties because of certain controls which he exercised through his military commanders. Speaking with that remarkable ability to summarize a great constitutional principle in a homely phrase, he said he could no more believe that the American people, through military action during time of war, would lose the right of public discussion, the liberty of speech and press, the law of evidence, trial by jury and habeas corpus during times of peace any more than he could believe that "a man could contract so strong an appetite for emetics during temporary illness as to persist in feeding upon them during the remainder of his healthful life".[73]

As martial law is the law of necessity and is limited in extent by the demands of necessity, such controls as curfew and exclusion from military areas must pass with the passing of the emergency which called them forth. Judged by this principle, the Commander-in-Chief and his subordinate military commanders

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[72]Tolan Committee Final Report (H. R. No. 2124, 77th Cong., 2nd Sess., May 1942), p. 11.

[73]Carl Sandburg, *Abraham Lincoln*, Vol. II, p. 167.

must be allowed a reasonable choice of the means by which they will discharge the tremendous responsibility imposed on them so that they may achieve the victory through which constitutional rights once more will be secure.

Dated, San Francisco, California,
May 7, 1943.

Respectfully submitted,

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I. H. VAN WINKLE,
Attorney General of the State of Oregon,

SMITH TROY,
Attorney General of the State of Washington,

FRED E. LEWIS,
Chief Assistant and Acting Attorney General of the State of Washington,

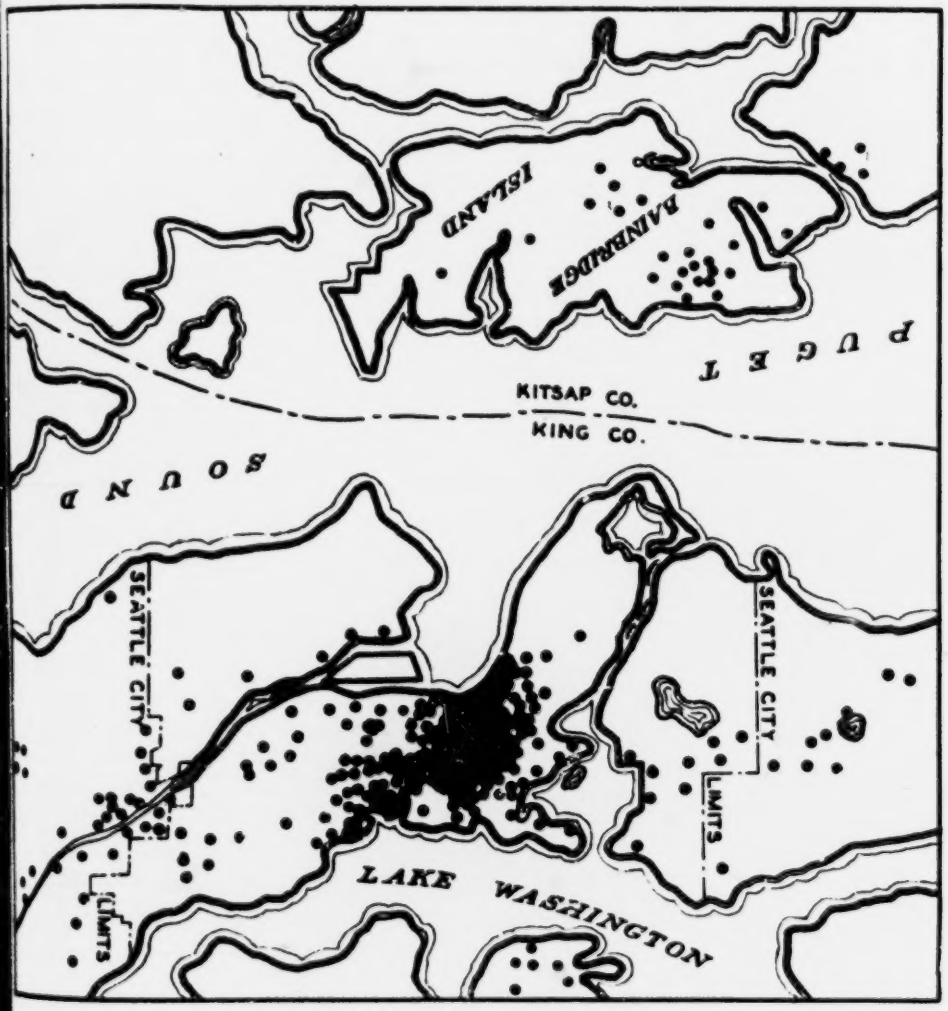
Attorneys for said States
as Amici Curiae.

(Appendix Follows.)

Appendix

DOT POPULATION CHARTS REPRESENTING THE CONCENTRATION OF PERSONS OF JAPANESE ANCESTRY IN THE SEATTLE, SAN FRANCISCO AND LOS ANGELES METROPOLITAN AREAS IN THE VICINITY OF IMPORTANT MILITARY AND NAVAL ESTABLISHMENTS, NATIONAL PLANTS AND UTILITIES.

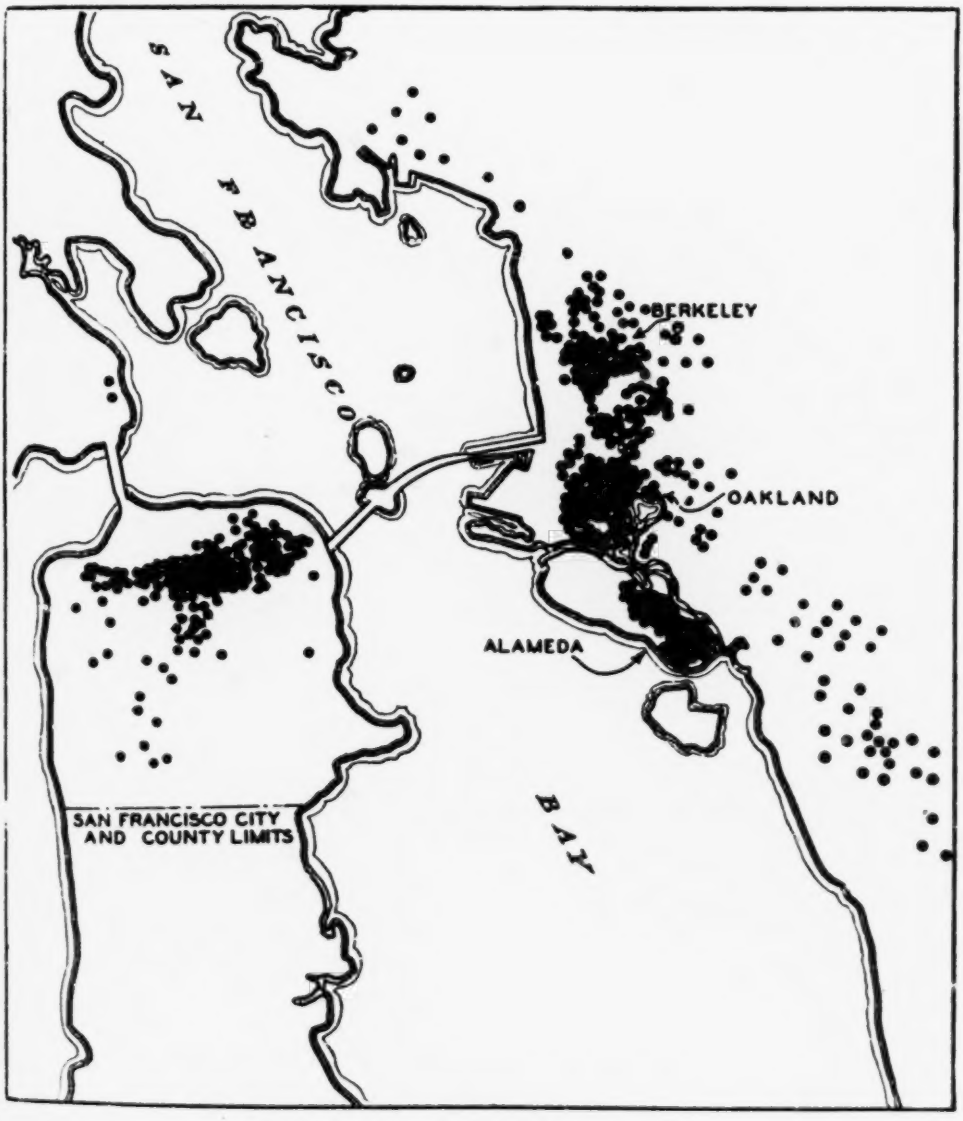
JAPANESE POPULATION—SEATTLE METROPOLITAN AREA



Legend: Each dot represents ten people

Chart 7.

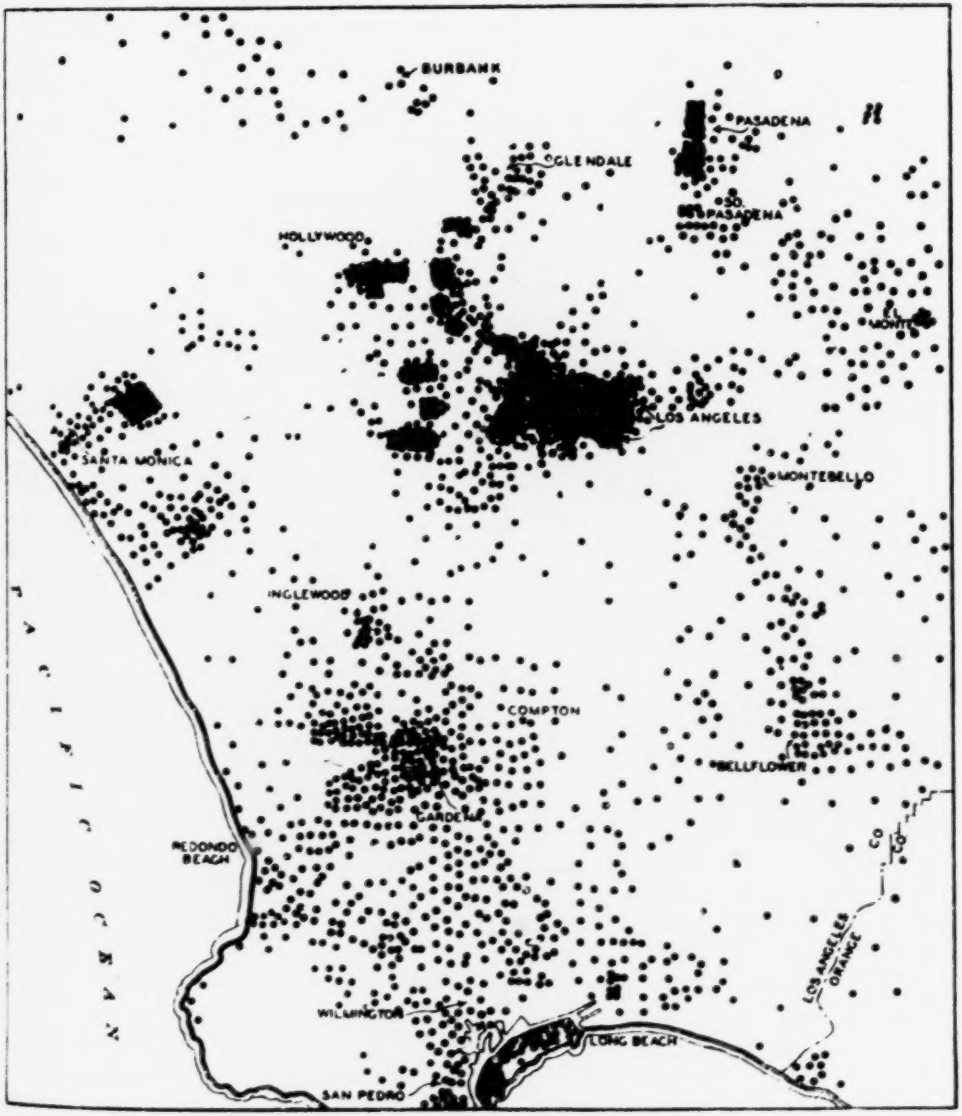
JAPANESE POPULATION—SAN FRANCISCO BAY AREA



Legend: Each dot represents ten people

Chart 8.

JAPANESE POPULATION—LOS ANGELES METROPOLITAN AREA



Legend: Each dot represents ten people

Chart 9.

SUPREME COURT OF THE UNITED STATES.

No. 870.—October Term, 1942.

Gordon Kiyoshi Hirabayashi, *vs.* The United States of America. } On Certificate from the United States Circuit Court of Appeals for the Ninth Circuit.

[June 21, 1943.]

Mr. Chief Justice Stone delivered the opinion of the Court.

Appellant, an American citizen of Japanese ancestry, was convicted in the district court of violating the Act of Congress of March 21, 1942, 56 Stat. 173, which makes it a misdemeanor knowingly to disregard restrictions made applicable by a military commander to persons in a military area prescribed by him as such, all as authorized by an Executive Order of the President.

The questions for our decision are whether the particular restriction violated, namely that all persons of Japanese ancestry residing in such an area be within their place of residence daily between the hours of 8:00 p. m. and 6:00 a. m., was adopted by the military commander in the exercise of an unconstitutional delegation by Congress of its legislative power, and whether the restriction unconstitutionally discriminated between citizens of Japanese ancestry and those of other ancestries in violation of the Fifth Amendment.

The indictment is in two counts. The second charges that appellant, being a person of Japanese ancestry, had on a specified date, contrary to a restriction promulgated by the military commander of the Western Defense Command, Fourth Army, failed to remain in his place of residence in the designated military area between the hours of 8:00 o'clock p. m. and 6:00 a. m. The first count charges that appellant, on May 11 and 12, 1942, had, contrary to a Civilian Exclusion Order issued by the military commander, failed to report to the Civil Control Station within the designated area, it appearing that appellant's required presence there was a preliminary step to the exclusion from that area of persons of Japanese ancestry.

By demurrer and plea in abatement, which the court overruled (46 F. Supp. 657), appellant asserted that the indictment should be dismissed because he was an American citizen who had never

been a subject of and had never borne allegiance to the Empire of Japan, and also because the Act of March 21, 1942, was an unconstitutional delegation of Congressional power. On the trial to a jury it appeared that appellant was born in Seattle in 1918, of Japanese parents who had come from Japan to the United States, and who had never afterward returned to Japan; that he was educated in the Washington public schools and at the time of his arrest was a senior in the University of Washington; that he had never been in Japan or had any association with Japanese residing there.

The evidence showed that appellant had failed to report to the Civil Control Station on May 11 or May 12, 1942, as directed, to register for evacuation from the military area. He admitted failure to do so, and stated it had at all times been his belief that he would be waiving his rights as an American citizen by so doing. The evidence also showed that for like reason he was away from his place of residence after 8:00 p. m. on May 9, 1942. The jury returned a verdict of guilty on both counts and appellant was sentenced to imprisonment for a term of three months on each, the sentences to run concurrently.

On appeal the Court of Appeals for the Ninth Circuit certified to us questions of law upon which it desired instructions for the decision of the case. See § 239 of the Judicial Code as amended, 28 U. S. C. § 346. Acting under the authority conferred upon us by that section we ordered that the entire record be certified to this Court so that we might proceed to a decision of the matter in controversy in the same manner as if it had been brought here by appeal. 318 U. S. —. Since the sentences of three months each imposed by the district court on the two counts were ordered to run concurrently, it will be unnecessary to consider questions raised with respect to the first count if we find that the conviction on the second count, for violation of the curfew order, must be sustained. *Brooks* v. *United States*, 267 U. S. 432, 441; *Gorin* v. *United States*, 312 U. S. 19, 33.

The curfew order which appellant violated, and to which the sanction prescribed by the Act of Congress has been deemed to attach, purported to be issued pursuant to an Executive Order of the President. In passing upon the authority of the military commander to make and execute the order, it becomes necessary to consider in some detail the official action which preceded or accompanied the order and from which it derives its purported authority.

On December 8, 1941, one day after the bombing of Pearl Harbor by a Japanese air force, Congress declared war against Japan. 55 Stat. 795. On February 19, 1942, the President promulgated Executive Order No. 9066. 7 Federal Register 1407. The Order recited that "the successful prosecution of the war requires every possible protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities as defined in Section 4, Act of April 20, 1918, 40 Stat. 533, as amended by the Act of November 30, 1940, 54 Stat. 1220, and the Act of August 21, 1941, 55 Stat. 655". By virtue of the authority vested in him as President and as Commander in Chief of the Army and Navy, the President purported to

"authorize and direct the Secretary of War, and the Military Commanders whom he may from time to time designate, whenever he or any designated Commander deems such action necessary or desirable, to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion."

On February 20, 1942, the Secretary of War designated Lt. General J. L. DeWitt as Military Commander of the Western Defense Command, comprising the Pacific Coast states and some others, to carry out there the duties prescribed by Executive Order No. 9066. On March 2, 1942, General DeWitt promulgated Public Proclamation No. 1. 7 Federal Register 2320. The proclamation recited that the entire Pacific Coast "by its geographical location is particularly subject to attack, to attempted invasion by the armed forces of nations with which the United States is now at war, and, in connection therewith, is subject to espionage and acts of sabotage, thereby requiring the adoption of military measures necessary to establish safeguards against such enemy operations". It stated that "the present situation requires as matter of military necessity the establishment in the territory embraced by the Western Defense Command of Military Areas and Zones thereof"; it specified and designated as military areas certain areas within the Western Defense Command; and it declared that "such persons or classes of persons as the situation may require" would, by subsequent proclamation, be excluded from certain of these areas, but might be permitted to enter or remain in certain others, under regulations

Briefs.

and restrictions to be later prescribed. Among the military areas so designated by Public Proclamation No. 1 was Military Area No. 1, which embraced, besides the southern part of Arizona, all the coastal region of the three Pacific Coast states, including the City of Seattle, Washington, where appellant resided. Military Area No. 2, designated by the same proclamation, included those parts of the coastal states and of Arizona not placed within Military Area No. 1.

Public Proclamation No. 2 of March 16, 1942, issued by General DeWitt, made like recitals and designated further military areas and zones. It contained like provisions concerning the exclusion, by subsequent proclamation, of certain persons or classes of persons from these areas, and the future promulgation of regulations and restrictions applicable to persons remaining within them. 7 Federal Register 2405.

An Executive Order of the President, No. 9102, of March 18, 1942, established the War Relocation Authority, in the Office for Emergency Management of the Executive Office of the President; it authorized the Director of War Relocation Authority to formulate and effectuate a program for the removal, relocation, maintenance and supervision of persons designated under Executive Order No. 9066, already referred to; and it conferred on the Director authority to prescribe regulations necessary or desirable to promote the effective execution of the program. 7 Federal Register 2165.

Congress, by the Act of March 21, 1942, provided: "That whoever shall enter, remain in, leave, or commit any act in any military area or military zone prescribed, under authority of an Executive order of the President, by the Secretary of War, or by any military commander designated by the Secretary of War, contrary to the restrictions applicable to any such area or zone or contrary to the order of the Secretary of War or any such military commander, shall, if it appears that he knew or should have known of the existence and extent of the restrictions or order and that his act was in violation thereof, be guilty of a misdemeanor and upon conviction shall be liable" to fine or imprisonment, or both.

Three days later, on March 24, 1942, General DeWitt issued Public Proclamation No. 3. 7 Federal Register 2543. After referring to the previous designation of military areas by Public Proclamations No. 1 and 2, it recited that " . . . the present

situation within these Military Areas and Zones requires as a matter of military necessity the establishment of certain regulations pertaining to all enemy aliens and all persons of Japanase ancestry within said Military Areas and Zones . . ." It accordingly declared and established that from and after March 27, 1942, "all alien Japanese, all alien Germans, all alien Italians, and all persons of Japanese ancestry residing or being within the geographical limits of Military Area No. 1 . . . shall be within their place of residence between the hours of 8:00 P. M. and 6 A. M., which period is hereinafter referred to as the hours of curfew". It also imposed certain other restrictions on persons of Japanese ancestry, and provided that any person violating the regulations would be subject to the criminal penalties provided by the Act of Congress of March 21, 1942.

Beginning on March 24, 1942, the military commander issued a series of Civilian Exclusion Orders pursuant to the provisions of Public Proclamation No. 1. Each such order related to a specified area within the territory of his command. The order applicable to appellant was Civilian Exclusion Order No. 57 of May 10, 1942. 7 Federal Register 3725. It directed that from and after 12:00 noon, May 16, 1942, all persons of Japanese ancestry, both alien and non-alien, be excluded from a specified portion of Military Area No. 1 in Seattle, including appellant's place of residence, and it required a member of each family, and each individual living alone, affected by the order to report on May 11 or May 12 to a designated Civil Control Station in Seattle. Meanwhile the military commander had issued Public Proclamation No. 4 of March 27, 1942, which recited the necessity of providing for the orderly evacuation and resettlement of Japanese within the area, and prohibited all alien Japanese and all persons of Japanese ancestry from leaving the military area until future orders should permit. 7 Federal Register 2601.

Appellant does not deny that he knowingly failed to obey the curfew order as charged in the second count of the indictment, or that the order was authorized by the terms of Executive Order No. 9066, or that the challenged Act of Congress purports to punish with criminal penalties disobedience of such an order. His contentions are only that Congress unconstitutionally delegated its legislative power to the military commander by authorizing him to impose the challenged regulation, and that, even if the regulation were in other respects lawfully authorized, the Fifth Amendment prohibits the discrimination made between citi-

zens of Japanese descent and those of other ancestry.

It will be evident from the legislative history that the Act of March 21, 1942, contemplated and authorized the curfew order which we have before us. The bill which became the Act of March 21, 1942, was introduced in the Senate on March 9th and in the House on March 10th at the request of the Secretary of War who, in letters to the Chairman of the Senate Committee on Military Affairs and to the Speaker of the House, stated explicitly that its purpose was to provide means for the enforcement of orders issued under Executive Order No. 9066. This appears in the committee reports on the bill, which set out in full the Executive Order and the Secretary's letter. 88 Cong. Rec. 2722, 2725; H. R. Rep. No. 1906, 77th Cong., 2d Sess.; S. Rep. No. 1171, 77th Cong., 2d Sess. And each of the committee reports expressly mentions curfew orders as one of the types of restrictions which it was deemed desirable to enforce by criminal sanctions.

When the bill was under consideration, General DeWitt had published his Proclamation No. 1 of March 2, 1942, establishing Military Areas Nos. 1 and 2, and that Proclamation was before Congress. S. Rep. No. 1171, 77th Cong., 2d Sess., p. 2; see also 88 Cong. Rec. 2724. A letter of the Secretary to the Chairman of the House Military Affairs Committee, of March 14, 1942, informed Congress that "General DeWitt is strongly of the opinion that the bill, when enacted, should be broad enough to enable the Secretary of War or the appropriate military commander to enforce curfews and other restrictions within military areas and zones"; and that General DeWitt had "indicated that he was prepared to enforce certain restrictions at once for the purpose of protecting certain vital national defense interests but did not desire to proceed until enforcement machinery had been set up". H. R. Rep. No. 1906, 77th Cong., 2d Sess., p. 3. See also letter of the Acting Secretary of War to the Chairman of the Senate Military Affairs Committee, March 13, 1942, 88 Cong. Rec. 2725.

The Chairman of the Senate Military Affairs Committee explained on the floor of the Senate that the purpose of the proposed legislation was to provide means of enforcement of curfew orders and other military orders made pursuant to Executive Order No. 9066. He read General DeWitt's Public Proclamation No. 1, and statements from newspaper reports that "evacuation of the first Japanese aliens and American-born Japanese" was about to

begin. He also stated to the Senate that "reasons for suspected widespread fifth-column activity among Japanese" were to be found in the system of dual citizenship which Japan deemed applicable to American-born Japanese, and in the propaganda disseminated by Japanese consuls, Buddhist priests and other leaders, among American-born children of Japanese. Such was stated to be the explanation of the contemplated evacuation from the Pacific Coast area of persons of Japanese ancestry, citizens as well as aliens. 88 Cong. Rec. 2722-26; see also pp. 2729-30. Congress also had before it the Preliminary Report of a House Committee investigating national defense migration, of March 19, 1942, which approved the provisions of Executive Order No. 9066, and which recommended the evacuation, from military areas established under the Order, of all persons of Japanese ancestry, including citizens. H. R. Rep. No. 1911, 77th Cong., 2d Sess. The proposed legislation provided criminal sanctions for violation of orders, in terms broad enough to include the curfew order now before us, and the legislative history demonstrates that Congress was advised that curfew orders were among those intended, and was advised also that regulation of citizen and alien Japanese alike was contemplated.

The conclusion is inescapable that Congress, by the Act of March 21, 1942, ratified and confirmed Executive Order No. 9066. *Prize Cases,* 2 Black 635, 671; *Hamilton* v. *Dillin,* 21 Wall. 73, 96-97; *United States* v. *Heinszen & Co.,* 206 U. S. 370, 382-84; *Tiaco* v. *Forbes,* 228 U. S. 549, 556; *Isbrandtsen-Moller Co.* v. *United States,* 300 U. S. 139, 146-48; *Swayne & Hoyt, Ltd.* v. *United States,* 300 U. S. 297, 300-03; *Mason Co.* v. *Tax Comm'n,* 302 U. S. 186, 208. And so far as it lawfully could, Congress authorized and implemented such curfew orders as the commanding officer should promulgate pursuant to the Executive Order of the President. The question then is not one of Congressional power to delegate to the President the promulgation of the Executive Order, but whether, acting in cooperation, Congress and the Executive have constitutional authority to impose the curfew restriction here complained of. We must consider also whether, acting together, Congress and the Executive could leave it to the designated military commander to appraise the relevant conditions and on the basis of that appraisal to say whether, under the circumstances, the time and place were appropriate for the promulgation of the curfew order and whether the

order itself was an appropriate means of carrying out the Executive Order for the "protection against espionage and against sabotage" to national defense materials, premises and utilities. For reasons presently to be stated, we conclude that it was within the constitutional power of Congress and the executive arm of the Government to prescribe this curfew order for the period under consideration and that its promulgation by the military commander involved no unlawful delegation of legislative power.

Executive Order No. 9066, promulgated in time of war for the declared purpose of prosecuting the war by protecting national defense resources from sabotage and espionage, and the Act of March 21, 1942, ratifying and confirming the Executive Order, were each an exercise of the power to wage war conferred on the Congress and on the President, as Commander in Chief of the armed forces, by Articles I and II of the Constitution. See *Ex parte Quirin,* 317 U. S. 1, 25-26. We have no occasion to consider whether the President, acting alone, could lawfully have made the curfew order in question, or have authorized others to make it. For the President's action has the support of the Act of Congress, and we are immediately concerned with the question whether it is within the constitutional power of the national government, through the joint action of Congress and the Executive, to impose this restriction as an emergency war measure. The exercise of that power here involves no question of martial law or trial by military tribunal. Cf. *Ex parte Milligan,* 4 Wall. 2; *Ex parte Quirin, supra.* Appellant has been tried and convicted in the civil courts and has been subjected to penalties prescribed by Congress for the acts committed.

The war power of the national government is "the power to wage war successfully". See Charles Evans Hughes, War Powers Under the Constitution, 42 A. B. A. Rep. 232, 238. It extends to every matter and activity so related to war as substantially to affect its conduct and progress. The power is not restricted to the winning of victories in the field and the repulse of enemy forces. It embraces every phase of the national defense, including the protection of war materials and the members of the armed forces from injury and from the dangers which attend the rise, prosecution and progress of war. *Prize Cases, supra; Miller* v. *United States,* 11 Wall. 268, 303-14; *Stewart* v. *Kahn,* 11 Wall. 493, 506-07; *Selective Draft Law Cases,* 245 U. S. 366; *McKinley* v. *United States,* 249 U. S. 397; *United States* v. *Macintosh,* 283 U. S. 605, 622-23.

Since the Constitution commits to the Executive and to Congress the exercise of the war power in all the vicissitudes and conditions of warfare, it has necessarily given them wide scope for the exercise of judgment and discretion in determining the nature and extent of the threatened injury or danger and in the selection of the means for resisting it. *Ex parte Quirin, supra,* 28-29; cf. *Prize Cases, supra,* 670; *Martin* v. *Mott,* 12 Wheat. 19, 29. Where, as they did here, the conditions call for the exercise of judgment and discretion and for the choice of means by those branches of the Government on which the Constitution has placed the responsibility of war-making, it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs.

The actions taken must be appraised in the light of the conditions with which the President and Congress were confronted in the early months of 1942, many of which, since disclosed, were then peculiarly within the knowledge of the military authorities. On December 7, 1941, the Japanese air forces had attacked the United States Naval Base at Pearl Harbor without warning, at the very hour when Japanese diplomatic representatives were conducting negotiations with our State Department ostensibly for the peaceful settlement of differences between the two countries. Simultaneously or nearly so, the Japanese attacked Malaysia, Hong Kong, the Philippines, and Wake and Midway Islands. On the following day their army invaded Thailand. Shortly afterwards they sank two British battleships. On December 13th, Guam was taken. On December 24th and 25th they captured Wake Island and occupied Hong Kong. On January 2, 1942, Manila fell, and on February 10th Singapore, Britain's great naval base in the East, was taken. On February 27th the battle of the Java Sea resulted in a disastrous naval defeat to the United Nations. By the 9th of March Japanese forces had established control over the Netherlands East Indies; Rangoon and Burma were occupied; Bataan and Corregidor were under attack.

Although the results of the attack on Pearl Harbor were not fully disclosed until much later, it was known that the damage was extensive, and that the Japanese by their successes had gained a naval superiority over our forces in the Pacific which might enable them to seize Pearl Harbor, our largest naval base and the last stronghold of defense lying between Japan and the west coast. That reasonably prudent men charged with the responsibility of our national defense had ample ground for concluding

that they must face the danger of invasion, take measures against it, and in making the choice of measures consider our internal situation, cannot be doubted.

The challenged orders were defense measures for the avowed purpose of safeguarding the military area in question, at a time of threatened air raids and invasion by the Japanese forces, from the danger of sabotage and espionage. As the curfew was made applicable to citizens residing in the area only if they were of Japanese ancestry, our inquiry must be whether in the light of all the facts and circumstances there was any substantial basis for the conclusion, in which Congress and the military commander united, that the curfew as applied was a protective measure necessary to meet the threat of sabotage and espionage which would substantially affect the war effort and which might reasonably be expected to aid a threatened enemy invasion. The alternative which appellant insists must be accepted is for the military authorities to impose the curfew on all citizens within the military area, or on none. In a case of threatened danger requiring prompt action, it is a choice between inflicting obviously needless hardship on the many, or sitting passive and unresisting in the presence of the threat. We think that constitutional government, in time of war, is not so powerless and does not compel so hard a choice if those charged with the responsibility of our national defense have reasonable ground for believing that the threat is real.

When the orders were promulgated there was a vast concentration, within Military Areas No. 1 and 2, of installations and facilities for the production of military equipment, especially ships and airplanes. Important Army and Navy bases were located in California and Washington. Approximately one-fourth of the total value of the major aircraft contracts then let by Government procurement officers were to be performed in the State of California. California ranked second, and Washington fifth, of all the states of the Union with respect to the value of shipbuilding contracts to be performed.[1]

In the critical days of March, 1942, the danger to our war production by sabotage and espionage in this area seems obvious.

[1] State Distribution of War Supply and Facility Contracts—June 1940 through December 1941 (issued by Office of Production Management, Bureau of Research and Statistics, January 18, 1942); *Ibid.*—Cumulative through February 1943 (issued by War Production Board, Statistics Division, April 3, 1943).

The German invasion of the Western European countries had given ample warning to the world of the menace of the "fifth column". Espionage by persons in sympathy with the Japanese Government had been found to have been particularly effective in the surprise attack on Pearl Harbor.[2] At a time of threatened Japanese attack upon this country, the nature of our inhabitants' attachments to the Japanese enemy was consequently a matter of grave concern. Of the 126,000 persons of Japanese descent in the United States, citizens and non-citizens, approximately 112,000 resided in California, Oregon and Washington at the time of the adoption of the military regulations. Of these approximately two-thirds are citizens because born in the United States. Not only did the great majority of such persons reside within the Pacific Coast states but they were concentrated in or near three of the large cities, Seattle, Portland and Los Angeles, all in Military Area No. 1.[3]

There is support for the view that social, economic and political conditions which have prevailed since the close of the last century, when the Japanese began to come to this country in substantial numbers, have intensified their solidarity and have in large measure prevented their assimilation as an integral part of the white population.[4] In addition, large numbers of children of Japanese parentage are sent to Japanese language schools outside the regular hours of public schools in the locality. Some of these schools are generally believed to be sources of Japanese nation-

[2] See "Attack upon Pearl Harbor by Japanese Armed Forces", Report of the Commission Appointed by the President, dated January 23, 1942, S. Doc. No. 159, 77th Cong., 2d Sess., pp. 12-13.

[3] Sixteenth Census of the United States, for 1940, Population, Second Series, Characteristics of the Population (Dep't. of Commerce): California, pp. 10, 61; Oregon, pp. 10, 50; Washington, pp. 10, 52. See also H. R. Rep. No. 2124, 77th Cong., 2d Sess., pp. 91-100.

[4] Federal legislation has denied to the Japanese citizenship by naturalization (R. S. § 2169; 8 U. S. C. § 703; see Ozawa v. United States, 260 U. S. 178), and the Immigration Act of 1924 excluded them from admission into the United States. 43 Stat. 161, 8 U. S. C. § 213. State legislation has denied to alien Japanese the privilege of owning land. 1 California General Laws (Deering, 1931), Act 261; 5 Oregon Comp. Laws Ann. (1940), § 61-102; 11 Washington Rev. Stat. Ann. (Remington, 1933), §§ 10581-10582. It has also sought to prohibit intermarriage of persons of Japanese race with Caucasians. Montana Rev. Codes (1935), § 5702. Persons of Japanese descent have often been unable to secure professional or skilled employment except in association with others of that descent, and sufficient employment opportunities of this character have not been available. Mears, Resident Orientals on the American Pacific Coast (1927), pp. 188, 198-209, 402-03; H. R. Rep. No. 2124, 77th Cong., 2d Sess., pp. 101-38.

alistic propaganda, cultivating allegiance to Japan.[5] Considerable numbers, estimated to be approximately 10,000, of American-born children of Japanese parentage have been sent to Japan for all or a part of their education.[6]

Congress and the Executive, including the military commander, could have attributed special significance, in its bearing on the loyalties of persons of Japanese descent, to the maintenance by Japan of its system of dual citizenship. Children born in the United States of Japanese alien parents, and especially those children born before December 1, 1924, are under many circumstances deemed, by Japanese law, to be citizens of Japan.[7] No official census of those whom Japan regards as having thus retained Japanese citizenship is available, but there is ground for the belief that the number is large.[8]

The large number of resident alien Japanese, approximately one-third of all Japanese inhabitants of the country, are of mature years and occupy positions of influence in Japanese communities. The association of influential Japanese residents with Japanese Consulates has been deemed a ready means for the dissemination of propaganda and for the maintenance of the influence of the Japanese Government with the Japanese population in this country.[9]

As a result of all these conditions affecting the life of the Japanese, both aliens and citizens, in the Pacific Coast area, there has been relatively little social intercourse between them and the white population. The restrictions, both practical and legal, affecting the privileges and opportunities afforded to persons of Japanese extraction residing in the United States, have been sources of irritation and may well have tended to increase their isolation,

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[5] Hearings before the Select Committee Investigating National Defense Migration, House of Representatives, 77th Cong., 2d Sess., pp. 11702, 11393-94, 11348.

[6] H. R. Rep. No. 1911, 77th Cong., 2d Sess., p. 16.

[7] Nationality Law of Japan, Article 1 and Article 20, § 3, and Regulations (Ordinance No. 26) of November 17, 1924,—all printed in Flournoy and Hudson, Nationality Laws (1929), pp. 382, 384-87. See also Foreign Relations of the United States, 1924, vol. 2, pp. 411-13.

[8] Statistics released in 1927 by the Consul General of Japan at San Francisco asserted that over 51,000 of the approximately 63,000 American-born persons of Japanese parentage then in the western part of the United States held Japanese citizenship. Mears, Resident Orientals on the American Pacific Coast, pp. 107-08, 429. A census conducted under the auspices of the Japanese government in 1930 asserted that approximately 47% of American-born persons of Japanese parentage in California held dual citizenship. Strong, The Second-Generation Japanese Problem (1934), p. 142.

[9] H. R. Rep. No. 1911, 77th Cong., 2d Sess., p. 17.

and in many instances their attachments to Japan and its institutions.

Viewing these data in all their aspects, Congress and the Executive could reasonably have concluded that these conditions have encouraged the continued attachment of members of this group to Japan and Japanese institutions. These are only some of the many considerations which those charged with the responsibility for the national defense could take into account in determining the nature and extent of the danger of espionage and sabotage, in the event of invasion or air raid attack. The extent of that danger could be definitely known only after the event and after it was too late to meet it. Whatever views we may entertain regarding the loyalty to this country of the citizens of Japanese ancestry, we cannot reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that population, whose number and strength could not be precisely and quickly ascertained. We cannot say that the war-making branches of the Government did not have ground for believing that in a critical hour such persons could not readily be isolated and separately dealt with, and constituted a menace to the national defense and safety, which demanded that prompt and adequate measures be taken to guard against it.

Appellant does not deny that, given the danger, a curfew was an appropriate measure against sabotage. It is an obvious protection against the perpetration of sabotage most readily committed during the hours of darkness. If it was an appropriate exercise of the war power its validity is not impaired because it has restricted the citizen's liberty. Like every military control of the population of a dangerous zone in war time, it necessarily involves some infringement of individual liberty, just as does the police establishment of fire lines during a fire, or the confinement of people to their houses during an air raid alarm—neither of which could be thought to be an infringement of constitutional right. Like them, the validity of the restraints of the curfew order depends on all the conditions which obtain at the time the curfew is imposed and which support the order imposing it.

But appellant insists that the exercise of the power is inappropriate and unconstitutional because it discriminates against citizens of Japanese ancestry, in violation of the Fifth Amendment. The Fifth Amendment contains no equal protection clause and it restrains only such discriminatory legislation by Congress as amounts to a denial of due process. *Detroit Bank* v. *United States*,

317 U. S. 329, 337-38, and cases cited. Congress may hit at a particular danger where it is seen, without providing for others which are not so evident or so urgent. *Keokee Coke Co.* v. *Taylor*, 234 U. S. 224, 227.

Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. For that reason, legislative classification or discrimination based on race alone has often been held to be a denial of equal protection. *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Yu Cong Eng* v. *Trinidad*, 271 U. S. 500; *Hill* v. *Texas*, 316 U. S. 400. We may assume that these considerations would be controlling here were it not for the fact that the danger of espionage and sabotage, in time of war and of threatened invasion, calls upon the military authorities to scrutinize every relevant fact bearing on the loyalty of populations in the danger areas. Because racial discriminations are in most circumstances irrelevant and therefore prohibited, it by no means follows that, in dealing with the perils of war, Congress and the Executive are wholly precluded from taking into account those facts and circumstances which are relevant to measures for our national defense and for the successful prosecution of the war, and which may in fact place citizens of one ancestry in a different category from others. "We must never forget, that it is *a constitution* we are expounding", "a constitution intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs". *McCulloch* v. *Maryland*, 4 Wheat. 316, 407, 415. The adoption by Government, in the crisis of war and of threatened invasion, of measures for the public safety, based upon the recognition of facts and circumstances which indicate that a group of one national extraction may menace that safety more than others, is not wholly beyond the limits of the Constitution and is not to be condemned merely because in other and in most circumstances racial distinctions are irrelevant. Cf. *Clarke* v. *Deckebach*, 274 U. S. 392, and cases cited.

Here the aim of Congress and the Executive was the protection against sabotage of war materials and utilities in areas thought to be in danger of Japanese invasion and air attack. We have stated in detail facts and circumstances with respect to the American citizens of Japanese ancestry residing on the Pacific Coast which support the judgment of the war-waging branches of the Government that some restrictive measure was urgent. We cannot say

that these facts and circumstances, considered in the particular war setting, could afford no ground for differentiating citizens of Japanese ancestry from other groups in the United States. The fact alone that attack on our shores was threatened by Japan rather than another enemy power set these citizens apart from others who have no particular associations with Japan.

Our investigation here does not go beyond the inquiry whether, in the light of all the relevant circumstances preceding and attending their promulgation, the challenged orders and statute afforded a reasonable basis for the action taken in imposing the curfew. We cannot close our eyes to the fact, demonstrated by experience, that in time of war residents having ethnic affiliations with an invading enemy may be a greater source of danger than those of a different ancestry. Nor can we deny that Congress, and the military authorities acting with its authorization, have constitutional power to appraise the danger in the light of facts of public notoriety. We need not now attempt to define the ultimate boundaries of the war power. We decide only the issue as we have defined it—we decide only that the curfew order as applied, and at the time it was applied, was within the boundaries of the war power. In this case it is enough that circumstances within the knowledge of those charged with the responsibility for maintaining the national defense afforded a rational basis for the decision which they made. Whether we would have made it is irrelevant.

What we have said also disposes of the contention that the curfew order involved an unlawful delegation by Congress of its legislative power. The mandate of the Constitution that all legislative power granted "shall be vested in Congress" has never been thought, even in the administration of civil affairs, to preclude Congress from resorting to the aid of executive or administrative officers in determining by findings whether the facts are such as to call for the application of previously adopted legislative standards or definitions of Congressional policy.

The purpose of Executive Order No. 9066, and the standard which the President approved for the orders authorized to be promulgated by the military commander—as disclosed by the preamble of the Executive Order—was the protection of our war resources against espionage and sabotage. Public Proclamations No. 1 and 2, by General DeWitt, contain findings that the military areas created and the measures to be prescribed for them were required to establish safeguards against espionage and sabotage.

Both the Executive Order and the Proclamations were before Congress when the Act of March 21, 1942, was under consideration. To the extent that the Executive Order authorized orders to be promulgated by the military commander to accomplish the declared purpose of the Order, and to the extent that the findings in the Proclamations establish that such was their purpose, both have been approved by Congress.

It is true that the Act does not in terms establish a particular standard to which orders of the military commander are to conform, or require findings to be made as a prerequisite to any order. But the Executive Order, the Proclamations and the statute are not to be read in isolation from each other. They were parts of a single program and must be judged as such. The Act of March 21, 1942, was an adoption by Congress of the Executive Order and of the Proclamations. The Proclamations themselves followed a standard authorized by the Executive Order—the necessity of protecting military resources in the designated areas against espionage and sabotage. And by the Act, Congress gave its approval to that standard. We have no need to consider now the validity of action if taken by the military commander without conforming to this standard approved by Congress, or the validity of orders made without the support of findings showing that they do so conform. Here the findings of danger from espionage and sabotage, and of the necessity of the curfew order to protect against them, have been duly made. General DeWitt's Public Proclamation No. 3, which established the curfew, merely prescribed regulations of the type and in the manner which Public Proclamations No. 1 and 2 had announced would be prescribed at a future date, and was thus founded on the findings of Proclamations No. 1 and 2.

The military commander's appraisal of facts in the light of the authorized standard, and the inferences which he drew from those facts, involved the exercise of his informed judgment. But as we have seen, those facts, and the inferences which could be rationally drawn from them, support the judgment of the military commander, that the danger of espionage and sabotage to our military resources was imminent, and that the curfew order was an appropriate measure to meet it.

Where, as in the present case, the standard set up for the guidance of the military commander, and the action taken and the reasons for it, are in fact recorded in the military orders, so that

Congress, the courts and the public are assured that the orders, in the judgment of the commander, conform to the standards approved by the President and Congress, there is no failure in the performance of the legislative function. *Opp Cotton Mills* v. *Administrator*, 312 U. S. 126, 142-46, and cases cited. The essentials of that function are the determination by Congress of the legislative policy and its approval of a rule of conduct to carry that policy into execution. The very necessities which attend the conduct of military operations in time of war in this instance as in many others preclude Congress from holding committee meetings to determine whether there is danger, before it enacts legislation to combat the danger.

The Constitution as a continuously operating charter of government does not demand the impossible or the impractical. The essentials of the legislative function are preserved when Congress authorizes a statutory command to become operative, upon ascertainment of a basic conclusion of fact by a designated representative of the Government. Cf. *The Aurora*, 7 Cranch 382; *United States* v. *Chemical Foundation*, 272 U. S. 1, 12. The present statute, which authorized curfew orders to be made pursuant to Executive Order No. 9066 for the protection of war resources from espionage and sabotage, satisfies those requirements. Under the Executive Order the basic facts, determined by the military commander in the light of knowledge then available, were whether that danger existed and whether a curfew order was an appropriate means of minimizing the danger. Since his findings to that effect were, as we have said, not without adequate support, the legislative function was performed and the sanction of the statute attached to violations of the curfew order. It is unnecessary to consider whether or to what extent such findings would support orders differing from the curfew order.

The conviction under the second count is without constitutional infirmity. Hence we have no occasion to review the conviction on the first count since, as already stated, the sentences on the two counts are to run concurrently and conviction on the second is sufficient to sustain the sentence. For this reason also it is unnecessary to consider the Government's argument that compliance with the order to report at the Civilian Control Station did not necessarily entail confinement in a relocation center.

Affirmed.

Mr. Justice DOUGLAS concurring.

While I concur in the result and agree substantially with the opinion of the Court, I wish to add a few words to indicate what for me is the narrow ground of decision.

After the disastrous bombing of Pearl Harbor the military had a grave problem on its hands. The threat of Japanese invasion of the west coast was not fanciful but real. The presence of many thousands of aliens and citizens of Japanese ancestry in or near to the key points along that coast line aroused special concern in those charged with the defense of the country. They believed that not only among aliens but also among citizens of Japanese ancestry there were those who would give aid and comfort to the Japanese invader and act as a fifth column before and during an invasion.[1] If the military were right in their belief that among citizens of Japanese ancestry there was an actual or incipient fifth column, we were indeed faced with the imminent threat of a dire emergency. We must credit the military with as much good faith in that belief as we would any other public official acting pursuant to his duties. We cannot possibly know all the facts which lay behind that decision. Some of them may have been as intangible and as imponderable as the factors which influence personal or business decisions in daily life. The point is that we cannot sit in judgment on the military requirements of that hour. Where the orders under the present Act have some relation to "protection against espionage and against sabotage", our task is at an end.

Much of the argument assumes that as a matter of policy it might have been wiser for the military to have dealt with these people on an individual basis and through the process of investigation and hearings separated those who were loyal from those who were not. But the wisdom or expediency of the decision which was made is not for us to review. Nor are we warranted where national survival is at stake in insisting that those orders should not have been applied to anyone without some evidence of his disloyalty.

[1] Judge Fee stated in United States v. Yasui, 48 Fed. Supp. 40, 44-45, the companion case to the present one, "The areas and zones outlined in the proclamations became a theatre of operations, subjected in localities to attack and all threatened during this period with a full scale invasion. The danger at the time this prosecution was instituted was imminent and immediate. The difficulty of controlling members of an alien race, many of whom, although citizens, were disloyal with opportunities of sabotage and espionage, with invasion imminent, presented a problem requiring for solution ability and devotion of the highest order."

The orders as applied to the petitioner are not to be tested by the substantial evidence rule. Peacetime procedures do not necessarily fit wartime needs. It is said that if citizens of Japanese ancestry were generally disloyal, treatment on a group basis might be justified. But there is no difference in power when the number of those who are finally shown to be disloyal or suspect is reduced to a small per cent. The sorting process might indeed be as time-consuming whether those who were disloyal or suspect constituted nine or ninety-nine per cent. And the pinch of the order on the loyal citizens would be as great in any case. But where the peril is great and the time is short, temporary treatment on a group basis may be the only practicable expedient whatever the ultimate percentage of those who are detained for cause. Nor should the military be required to wait until espionage or sabotage becomes effective before it moves.

It is true that we might now say that there was ample time to handle the problem on the individual rather than the group basis. But military decisions must be made without the benefit of hindsight. The orders must be judged as of the date when the decision to issue them was made. To say that the military in such cases should take the time to weed out the loyal from the others would be to assume that the nation could afford to have them take the time to do it. But as the opinion of the Court makes clear, speed and dispatch may be of the essence. Certainly we cannot say that those charged with the defense of the nation should have procrastinated until investigations and hearings were completed. At that time further delay might indeed have seemed to be wholly incompatible with military responsibilities.

Since we cannot override the military judgment which lay behind these orders, it seems to me necessary to concede that the army had the power to deal temporarily with these people on a group basis. Petitioner therefore was not justified in disobeying the orders.

But I think it important to emphasize that we are dealing here with a problem of loyalty not assimilation. Loyalty is a matter of mind and of heart not of race. That indeed is the history of America. Moreover, guilt is personal under our constitutional system. Detention for reasonable cause is one thing. Detention on account of ancestry is another.

In this case the petitioner tendered by a plea in abatement the question of his loyalty to the United States. I think that

plea was properly stricken; military measures of defense might be paralyzed if it were necessary to try out that issue preliminarily. But a denial of that opportunity in this case does not necessarily mean that petitioner could not have had a hearing on that issue in some appropriate proceeding. Obedience to the military orders is one thing. Whether an individual member of a group must be afforded at some stage an opportunity to show that, being loyal, he should be reclassified is a wholly different question.

There are other instances in the law where one must obey an order before he can attack as erroneous the classification in which he has been placed. Thus it is commonly held that one who is a conscientious objector has no privilege to defy the Selective Service Act and to refuse or fail to be inducted. He must submit to the law. But that line of authority holds that after induction he may obtain through *habeas corpus* a hearing on the legality of his classification by the draft board.[2] Whether in the present situation that remedy would be available is one of the large and important issues reserved by the present decision. It has been suggested that an administrative procedure has been established to relieve against unwarranted applications of these orders. Whether in that event the administrative remedy would be the only one available or would have to be first exhausted is also reserved. The scope of any relief which might be afforded—whether the liberties of an applicant could be restored only outside the areas in question—is likewise a distinct issue. But if it were plain that no machinery was available whereby the individual could demonstrate his loyalty as a citizen in order to be reclassified, questions of a more serious character would be presented. The United States, however, takes no such position. We need go no further here than to deny the individual the right to defy the law. It is sufficient to say that he cannot test in that way the validity of the orders as applied to him.

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[2] See United States *v.* Powell, 38 F. Supp. 183; Application of Greenberg, 39 F. Supp. 13; United States *v.* Baird, 39 F. Supp. 392; Micheli *v.* Paullin, 45 F. Supp. 687; United States *v.* Embrey, 46 F. Supp. 916; In re Rogers, 47 F. Supp. 265; Ex parte Stewart, 47 F. Supp. 410; United States *v.* Smith, 48 F. Supp. 842; Ex parte Robert, 49 F. Supp. 131; United States *v.* Grieme, 128 F. 2d 811; Fletcher *v.* United States, 129 F. 2d 262; Drumheller *v.* Berks County Local Board No. 1, 130 F. 2d 610, 612. For cases arising under the Selective Draft Act of 1917, see United States *v.* Kinkead, 250 Fed. 692; Ex parte McDonald, 253 Fed. 99; Ex parte Cohen, 254 Fed. 711; Arbitman *v.* Woodside, 258 Fed. 441; Ex parte Thierat, 268 Fed. 472, 476. And see 10 Geo. Wash. L. Rev. 827.

Mr. Justice MURPHY, concurring.

It is not to be doubted that the action taken by the military commander in pursuance of the authority conferred upon him was taken in complete good faith and in the firm conviction that it was required by considerations of public safety and military security. Neither is it doubted that the Congress and the Executive working together may generally employ such measures as are necessary and appropriate to provide for the common defense and to wage war "with all the force necessary to make it effective." *United States* v. *Macintosh*, 283 U. S. 605, 622. This includes authority to exercise measures of control over persons and property which would not in all cases be permissible in normal times.[1]

It does not follow, however, that the broad guaranties of the Bill of Rights and other provisions of the Constitution protecting essential liberties are suspended by the mere existence of a state of war. It has been frequently stated and recognized by this Court that the war power, like the other great substantive powers of government, is subject to the limitations of the Constitution. See *Ex parte Milligan*, 4 Wall. 2; *Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146, 156; *Home Building & Loan Association* v. *Blaisdell*, 290 U. S. 398, 426. We give great deference to the judgment of the Congress and of the military authorities as to what is necessary in the effective prosecution of the war, but we can never forget that there are constitutional boundaries which it is our duty to uphold. It would not be supposed, for instance, that public elections could be suspended or that the prerogatives of the courts could be set aside, or that persons not charged with offenses against the law of war (see *Ex parte Quirin*, 317 U. S. 1) could be deprived of due process of law and the benefits of trial by jury, in the absence of a valid declaration of martial law. Cf. *Ex parte Milligan*, *supra*.

Distinctions based on color and ancestry are utterly inconsistent with our traditions and ideals. They are at variance with the principles for which we are now waging war. We cannot close our eyes to the fact that for centuries the Old World has

[1] Schenck v. United States, 249 U. S. 47; Debs v. United States, 249 U. S. 211; United States v. Bethlehem Steel Corp., 315 U. S. 289, 305; Northern Pac. Ry. Co. v. North Dakota, 250 U. S. 135; Dakota Cent. Tel. Co. v. South Dakota, 250 U. S. 163; Highland v. Russell Car Co., 279 U. S. 253; Selective Draft Law Cases, 245 U. S. 366.

been torn by racial and religious conflicts and has suffered the worst kind of anguish because of inequality of treatment for different groups. There was one law for one and a different law for another. Nothing is written more firmly into our law than the compact of the Plymouth voyagers to have just and equal laws. To say that any group cannot be assimilated is to admit that the great American experiment has failed, that our way of life has failed when confronted with the normal attachment of certain groups to the lands of their forefathers. As a nation we embrace many groups, some of them among the oldest settlements in our midst, which have isolated themselves for religious and cultural reasons.

Today is the first time, so far as I am aware, that we have sustained a substantial restriction of the personal liberty of citizens of the United States based upon the accident of race or ancestry. Under the curfew order here challenged no less than 70,000 American citizens have been placed under a special ban and deprived of their liberty because of their particular racial inheritance. In this sense it bears a melancholy resemblance to the treatment accorded to members of the Jewish race in Germany and in other parts of Europe. The result is the creation in this country of two classes of citizens for the purposes of a critical and perilous hour—to sanction discrimination between groups of United States citizens on the basis of ancestry. In my opinion this goes to the very brink of constitutional power.

Except under conditions of great emergency a regulation of this kind applicable solely to citizens of a particular racial extraction would not be regarded as in accord with the requirement of due process of law contained in the Fifth Amendment. We have consistently held that attempts to apply regulatory action to particular groups solely on the basis of racial distinction or classification is not in accordance with due process of law as prescribed by the Fifth and Fourteenth Amendments. Cf. *Yick Wo.* v. *Hopkins*, 118 U. S. 356, 369; *Yu Con Eng* v. *Trinidad*, 271 U. S. 500, 524-28. See also *Boyd* v. *Frankfort*, 117 Ky. 119; *Opinion of the Justices*, 207 Mass. 601. It is true that the Fifth Amendment, unlike the Fourteenth, contains no guarantee of equal protection of the laws. Cf. *Currin* v. *Wallace*, 306 U. S. 1, 14. It is also true that even the guaranty of equal protection of the laws allows a measure of reasonable classification. It by no means follows, how-

ever, that there may not be discrimination of such an injurious character in the application of laws as to amount to a denial of due process of law as that term is used in the Fifth Amendment.[2] I think that point is dangerously approached when we have one law for the majority of our citizens and another for those of a particular racial heritage.

In view, however, of the critical military situation which prevailed on the Pacific Coast area in the spring of 1942, and the urgent necessity of taking prompt and effective action to secure defense installations and military operations against the risk of sabotage and espionage, the military authorities should not be required to conform to standards of regulatory action appropriate to normal times. Because of the damage wrought by the Japanese at Pearl Harbor and the availability of new weapons and new techniques with greater capacity for speed and deception in offensive operations, the immediate possibility of an attempt at invasion somewhere along the Pacific Coast had to be reckoned with. However desirable such a procedure might have been, the military authorities could have reasonably concluded at the time that determinations as to the loyalty and dependability of individual members of the large and widely scattered group of persons of Japanese extraction on the West Coast could not be made without delay that might have had tragic consequences. Modern war does not always wait for the observance of procedural requirements that are considered essential and appropriate under normal conditions. Accordingly I think that the military arm, confronted with the peril of imminent enemy attack and acting under the authority conferred by the Congress, made an allowable judgment at the time the curfew restriction was imposed. Whether such a restriction is valid today is another matter.

In voting for affirmance of the judgment I do not wish to be understood as intimating that the military authorities in time of war are subject to no restraints whatsoever, or that they are free to impose any restrictions they may choose on the rights and liberties of individual citizens or groups of citizens in those places which may be designated as "military areas". While this Court

[2] For instance, if persons of an accused's race were systematically excluded from a jury in a federal court, any conviction undoubtedly would be considered a violation of the requirement of due process of law, even though the ground commonly stated for setting aside convictions so obtained in state courts is denial of equal protection of the laws. Cf. Glasser v. United States, 315 U. S. 60, with Smith v. Texas, 311 U. S. 128.

sits, it has the inescapable duty of seeing that the mandates of the Constitution are obeyed. That duty exists in time of war as well as in time of peace, and in its performance we must not forget that few indeed have been the invasions upon essential liberties which have not been accompanied by pleas of urgent necessity advanced in good faith by responsible men. Cf. Mr. Justice Brandeis concurring in *Whitney* v. *California*, 274 U. S. 357, 372.

Nor do I mean to intimate that citizens of a particular racial group whose freedom may be curtailed within an area threatened with attack should be generally prevented from leaving the area and going at large in other areas that are not in danger of attack and where special precautions are not needed. Their status as citizens, though subject to requirements of national security and military necessity, should at all times be accorded the fullest consideration and respect. When the danger is past, the restrictions imposed on them should be promptly removed and their freedom of action fully restored.

Mr. Justice RUTLEDGE, concurring.

I concur in the Court's opinion, except for the suggestion, if that is intended (as to which I make no assertion), that the courts have no power to review any action a military officer may "in his discretion" find it necessary to take with respect to civilian citizens in military areas or zones, once it is found that an emergency has created the conditions requiring or justifying the creation of the area or zone and the institution of some degree of military control short of suspending habeas corpus. Given the generating conditions for exercise of military authority and recognizing the wide latitude for particular applications that ordinarily creates, I do not think it is necessary in this case to decide that there is no action a person in the position of General De Witt here may take, and which he may regard as necessary to the region's or the country's safety, which will call judicial power into play. The officer of course must have wide discretion and room for its operation. But it does not follow there may not be bounds beyond which he cannot go and, if he oversteps them, that the courts may not have power to protect the civilian citizen. But in this case that question need not be faced and I merely add my reservation without indication of opinion concerning it.